Issue: Misapplication of EEO or VSDP Policy; Hearing Date: 02/11/05; Decision Issued: 02/14/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 7953

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7953

Hearing Date: February 11, 2005
Decision Issued: February 14, 2005

PROCEDURAL ISSUE

The hearing was initially docketed for January 21, 2005. Due to the unavailability of a witness, the hearing had to be rescheduled for February 11, 2005.

APPEARANCES

Grievant
Attorney for Grievant
Human Resource Officer
Attorney for Agency
Paralegal for Attorney
Three witnesses 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 grievance asserting that the agency had given her a job knowing that she had a disability.[1] The agency closed the grievance because grievant did not have access to the grievance procedure and because grievant failed to initiate her grievance within the required 30-day period. Grievant requested an access and compliance ruling from the Department of Employment Dispute Resolution (EDR). The EDR Director ruled that grievant had access to the grievance procedure but only with respect to the issue of whether the agency improperly moved her into long term disability on February 11, 2003.[2] The grievance proceeded through the management resolution steps; when the parties failed to resolve the grievance at the third step, the agency head did not qualify the grievance for a hearing. Grievant requested a qualification and compliance ruling from EDR. The EDR Director ruled that the grievance was qualified for a hearing to determine whether any applicable policies, viz., VSDP or EEO, have been misapplied.[3]

The Virginia Department of Corrections (Hereinafter referred to as agency) employed grievant for 13 years. At the time of removal from employment, grievant was a postal assistant.

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.[4] The VSDP is administered by a third party administrator (TPA).[5] Grievant accepted VSDP, was enrolled in the program, and was given a copy of the VSDP Handbook.[6] The VSDP provides eligible employees supplemental or replacement income during periods of partial or total disability. Short-term

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[1] Agency Exhibit 1. Grievance Form A, filed March 11, 2003.

[2] Agency Exhibit 1. *Access and Compliance Rulings of Director*, No. 2003-070, October 6, 2003. [NOTE: Grievant's allegations that the agency improperly reassigned her in early 2002 to a mail room position, and later failed to offer her other positions, were ruled to be untimely filed and, therefore, could not proceed as separate claims for which relief could be granted.]

[3] Agency Exhibit 2. *Qualification and Compliance Ruling of Director,* No. 2004-879, December 2, 2004. [NOTE: This ruling reaffirmed that grievant's request for relief from her initial assignment to the mail room in 2002 was untimely.]

[4] Agency Exhibit 11. Department of Human Resource Management (DHRM) Policy 4.57, *Virginia Sickness and Disability Program Leave*, effective January 1, 1999.

[5] At all times relevant to this grievance, the TPA was CORE. The contract with the current TPA - Unum Provident – became effective on January 1, 2004.

[6] Agency Exhibit 2. VSDP Handbook.

disability (STD) benefits are paid for up to 180 days. Long-term disability (LTD) benefits begin at the conclusion of the STD period. Return to an employee's pre-disability position is not guaranteed after the employee begins long-term disability.[7] Return to covered employment from LTD status must be through the competitive recruitment process.[8]

Only the VSDP can determine when an employee is able to return to work. The evidence established that only the TPA communicates 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 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 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.

If an employee feels able to return to work, either full-time or with restrictions, the employee advises her physician. The physician then provides relevant medical information and recommendations to the TPA. In turn, the TPA contacts the employee's agency to determine whether there are any available positions that meet the physician's restrictions. Agencies are encouraged to provide reasonable accommodations for disabled employees. The TPA works with employees, their physician, and the agency to assist employees to return to work with job modifications, where reasonable.

Grievant had a left total hip replacement in 1994. By 2002, grievant had begun to experience weakness and loss of strength in her right hip. During late 2001-early 2002, all state agencies were experiencing severe budget constrictions and a hiring freeze was implemented. Each agency head was required to reexamine their budget and to utilize personnel in the most cost-effective manner possible.[9] At grievant's facility, the warden determined that current vacancies could be best and most cost-effectively filled by reassigning certain job duties among six of the administrative staff. Grievant, who had previously been working on the switchboard and performing some clerical tasks, was assigned to work as a postal assistant in the mail room.[10]

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[7] Agency Exhibit 20, p.5. "While an employee is on short-term disability, the position is held open. During long-term disability the agency is not required to hold the job open. See also p.10, *Virginia Sickness & Disability Program Handbook*, 2004.

[8] Agency Exhibit 14. VSDP Policy 4, p.3 & 4. Section V., Item 1, Employment status of employees.

[9] Agency Exhibit 4. Memorandum from Human Resource Director, February 4, 2002; memorandum from agency head, August 12, 2002.

[10] Agency Exhibit 9. Memorandum from warden to those concerned, February 11, 2002.

Grievant advised the warden that her hip problem prevented her from lifting the heaviest mailbags. The warden granted her a temporary exemption from lifting mailbags until grievant provided medical documentation.[11] Grievant's physician provided a list of restrictions for grievant and the agency accommodated the restrictions by not requiring grievant to lift mailbags that exceeded 20 pounds. The agency went to the local postmistress, who agreed to limit the weight of all mailbags for the agency to 20 pounds or less.[12] In addition, the agency made modifications to the agency's mail van to accommodate grievant's disability.

Grievant applied for workers' compensation benefits; the workers' compensation carrier denied her claim. Grievant applied and was approved for short-term disability leave effective August 15, 2002.[13] In October 2002, VSDP contacted the agency asking whether grievant could perform her job with a restriction of no lifting or carrying greater than five pounds, no bending, and no prolonged standing. The agency advised that a postal assistant could not perform the essential functions of the job under such restrictions.[14] Grievant remained on STD until it expired after 180 days. On February 11, 2003, grievant was transitioned to LTD and remains in that status at this time.[15] There is no evidence that grievant's physician ever indicated to the TPA that grievant was able to return to her position without restrictions. The restrictions imposed by the physician were such that grievant would be unable to perform the essential functions of her position.

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:

[11] Grievant Exhibit C. Letter from warden to grievant, February 15, 2002.
[12] Agency Exhibit 10. Memorandum from Operations Officer to postal assistants, May 15, 2002.
[13] Agency Exhibit 10. VSDP Action Report, September 24, 2002.
[14] Agency Exhibit 10. Full-time job modification form, October 22, 2002.
[15] Agency Exhibit 10. VSDP Action Report, June 17, 2004.

> 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 her evidence first and must prove her claim by a preponderance of the evidence.[16]

The EDR qualification ruling suggests that the hearing officer should make a disability determination in this case. The hearing officer respectfully disagrees; the hearing officer is neither a physician nor a trained health professional. A hearing officer must rely on those who are professionally trained such as grievant's physician and the health professionals employed by the TPA. In this case, the available evidence from both those sources indicates that grievant was disabled at the time her employment ended, and remains disabled to this date.

The undisputed evidence establishes that grievant was on short-term disability and totally unable to work until she transitioned into long-term disability on February 11, 2003. 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. The agency cannot hold a position open indefinitely. Once the grievant transitioned into LTD, the agency had the option either to hold the position open longer or to fill the position. In this case, for legitimate business reasons, the agency determined that it could no longer hold the position open for grievant.

If grievant had indicated to her physician that she was able to return to work before the 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 her physician that she was ready to return to work, presumably because grievant remains totally disabled.

Grievant suggests that the agency should have placed her in some other position. As noted above, when an employee is absent due to 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 her physician. Once an employee indicates a willingness to return to work, and the

[16] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective August 30, 2004.

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 remains that grievant did not, through her physician, demonstrate that she was able to return to work. However, even if grievant had been able to work, that agency has shown that it was precluded from filling vacancies due to budget constrictions and a hiring freeze.

Although grievant never mentioned or alleged misapplication of the Equal Employment Opportunity (EEO) policy[17], the EDR Qualification ruling concluded that her grievance "appears" to make out such a claim. The agency argues, based on the testimony of a policy analyst from the Department of Human Resource Management, that the EEO policy does not apply to grievant's case. Such a reading of the policy appears too narrow. The policy's stated purpose is to provide "that *all aspects* of human resource management" be conducted without regard to disability. The prohibition against employment discrimination applies to *all aspects* of employment practices including hiring and layoff. The agency's decision not to hold grievant's position open was an employment practice that should be handled without discriminating on the basis of disability.

However, that results in somewhat of a "catch-22" situation. The agency decided not to hold grievant's position open for her because grievant remained disabled and was unlikely to be able to work in the foreseeable future. In this case, there is no evidence that the agency made its decision in a discriminatory manner. Given the VSDP rules on transition to LTD status, agencies have the option to hold a position open or to fill it with someone else. The agency made a decision based on business needs to fill the position since there was no reasonable likelihood that grievant would ever be able to return to the position.

Grievant points to a letter from the warden which appears to preclude the possibility that grievant could return to work following the expiration of STD.[18] The letter's next-to-last sentence appears conclusionary in nature. Based on the totality of evidence in this case, it is presumed that the warden wrote based on the agency's knowledge that grievant would likely be transitioning into LTD because her physician was not holding out any hope that grievant would be able to work in her position again. He also considered the fact that, in their meeting the previous day, grievant had no suggestions as to how she could return to work. While the warden's anticipatory conclusion should not have been put in writing, it did not preclude grievant from returning to work if she had been able to do so. If grievant and her physician had indicated that grievant could return to work without restrictions, or with restrictions that the agency could accommodate, grievant could have returned to work before her STD expired. However, the fact is that grievant has not been able to return to work.

[17] Agency Exhibit 16. DHRM Policy 2.05, *Equal Employment Opportunity*, effective September 25, 2000.
[18] Grievant Exhibit B. Letter from warden to grievant, December 11, 2002.

Grievant claims that she could possibly have been placed in some other position. However, grievant has not identified any vacancies that were available between December 2002 and March 2003, let alone any vacancies that she could have performed with her physical restrictions and disability. Grievant has not met the burden of proof to show that the agency misapplied either the EEO policy or the VSDP policy.

DECISION

Grievant has not shown that the agency misapplied any policy when it terminated her employment following her 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. 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.[19] 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.[20]

[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

[19] 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).

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