

Issue: Discrimination, administrative inconsistency, failure to communicate necessary information to employee, and unfair treatment; Hearing Date: 08/05/05; Decision Issued: 08/15/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8134



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8134

Hearing Date: August 5, 2005  
Decision Issued: August 15, 2005

APPEARANCES

Grievant  
Attorney for Grievant  
One witness for Grievant  
Warden  
Advocate for Agency  
One witness for Agency

ISSUES

Did the agency misapply policy when it determined that it could no longer accommodate grievant's work restrictions? Did the agency discriminate against grievant?

## FINDINGS OF FACT

The grievant filed a grievance alleging discrimination, administrative inconsistency, failure to communicate necessary information to employee, and unfair treatment.<sup>1</sup> 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 the Department of Employment Dispute Resolution (EDR). The EDR Director ruled that grievant had access to the grievance procedure but only to challenge her movement into long term disability status and any actions related to that move.<sup>2</sup>

The Virginia Department of Corrections (Hereinafter referred to as agency) employed grievant as a corrections officer for six years. She has not been disciplined.

In 1999, the Commonwealth implemented the Virginia Sickness and Disability Program (VSDP) for state employees. The VSDP is administered by a third party administrator (TPA).<sup>3</sup> Grievant accepted VSDP, was enrolled in the program, and was given a copy of the VSDP Handbook.<sup>4</sup> The VSDP provides eligible employees supplemental or replacement income during periods of partial or total disability. Short-term 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.<sup>5</sup> Return to covered employment from LTD status must be through the competitive recruitment process.

Grievant developed sporadic back pain beginning in 2003. Her family physician referred her to a specialist who recommended that grievant stop working for a period of time. Grievant was placed on STD on August 21, 2003 and did not return to work until October 29, 2003. At that time grievant's physician allowed her to return to work with certain restrictions, viz., avoid climbing stairs or lifting more than 15-20 pounds. As a result, the agency accommodated grievant by placing her in STD-Working status on October 29, 2003 and by giving her assignments that did not involve working in watch towers or the second tier of housing units. On February 18, 2004, grievant was automatically moved into LTD-Working status when the 180-day STD period was exhausted; she continued to work under the same restrictions ordered by the

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<sup>1</sup> Agency Exhibit 1. Grievance Form A, filed January 14, 2005. [NOTE: Grievant was moved into LTD status on December 13, 2004. Grievant filed her grievance more than 30 days after that event. While the agency could have declined the grievance as untimely filed, it allowed the grievance to proceed into the resolution steps. The agency's decision to proceed through the resolution steps effectively amounts to a waiver of the right to decline the grievance.]

<sup>2</sup> Agency Exhibit 3. Department of Employment Dispute Resolution (EDR) *Qualification and Compliance Ruling of Director*, No. 2005-1006, June 27, 2005.

<sup>3</sup> 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.

<sup>4</sup> Agency Exhibit 4. VSDP Handbook.

<sup>5</sup> Agency Exhibit 4, p.10, *Ibid.*

physician in 2003. On March 20, 2004 grievant was released to return to work without restrictions. In the summer of 2004, grievant again developed sporadic back pain. Her physician diagnosed degenerative changes in some thoracic and lumbar discs.<sup>6</sup> He reimposed the same restrictions of avoiding stairs or heavy lifting. The agency again elected to accommodate grievant in an adjusted work assignment for 90 days. As a result, grievant was placed in LTD-Working status on August 18, 2004.

The agency has promulgated a policy that addresses temporary adjustments in work assignments for employees suffering a short-term impairment including illness, injury or other medical condition not related to a workers' compensation injury.<sup>7</sup> The policy provides that adjusted work assignments shall not exceed ninety days unless extended by the Organizational Unit Head. Extensions should *only* be granted if the physician certifies that the employee is making significant rehabilitative progress which should result in return to full duty in the near future. The extension must be requested in writing by the employee prior to the end of the ninety-day period.

Grievant's ninety-day temporary work assignment period was scheduled to expire on November 16, 2004. Grievant did not make a written request for an extension but did advise the agency that her physician had scheduled her for a December 4, 2004 operative procedure that would hopefully alleviate her back pain. On the strength of that assertion, the agency voluntarily decided to further accommodate grievant by extending the temporary work assignment for an additional thirty days. Grievant underwent a surgical procedure on December 4, 2004 which involved the injection of anesthetic and steroid solution into four lumbar discs. When grievant returned to work the following week, she had been assigned on that particular day to a roving patrol (driving a vehicle around the facility perimeter). Grievant advised her supervisor that she was having more pain than before the operative procedure and asked to be relieved from that assignment. She called her husband who, in turn, called grievant's physician on December 8, 2004 and explained grievant's concern.

The physician faxed a note to the agency further restricting grievant's allowable work activities.<sup>8</sup> In addition to the earlier lifting and stair-climbing restrictions, the physician specified that grievant should be given five-minute breaks every hour and that she should not drive vehicles that might subject her to hard stops or bumping. The physician's note also stated that grievant would next be reevaluated by the physician in two months (early February 2005). Because the medical documentation, as well as grievant's own request for additional relief indicated that her condition was worse than before the operative procedure, the agency concluded that it could not grant a further extension of an even more

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<sup>6</sup> Grievant Exhibit 1. Physician's reports, August 20, 2004.

<sup>7</sup> Agency Exhibit 1. Procedure 5-52, *Temporary Adjustments to Work Assignments*, June 17, 1997.

<sup>8</sup> Grievant Exhibit 1. Physician excuse, dated December 9, 2004, faxed to work December 13, 2004.

restricted work assignment. Accordingly, at the end of the 30-day extension on December 13, 2004, the agency ended the accommodation period and the TPA moved grievant from LTD-Working to LTD status. At that point, grievant was moved from active employee status to an inactive employee status.

Eight days later, grievant went to see her physician and told him she did not have any more pain. The physician released her to return to full duty work on December 21, 2004.<sup>9</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 a claim of misapplication of policy, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.<sup>10</sup>

The EDR Director qualified this grievance for hearing to determine whether the agency misapplied or unfairly applied either the Commonwealth's Equal Employment Opportunity (EEO) policy or the Virginia Sickness and

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<sup>9</sup> Grievant Exhibit 1. Physician excuse, December 21, 2004.

<sup>10</sup> § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective August 30, 2004.

Disability Program (VSDP).<sup>11</sup> By reference, the EEO policy incorporates the definition of “disability” found in the Americans with Disabilities Act (ADA). Based on the evidence, grievant had a physical impairment (a physiological condition of the musculoskeletal system, i.e., her back) that affected two of her major life activities (MLA) (lifting, and walking up stairs). In order to be considered an “individual with a disability,” the physical impairment must “substantially limit” the affected MLAs. In this case, the extent and impact of grievant’s impairment appears to have been mild because the physician did not state that grievant could not perform these activities, only that she should limit lifting to less than 20 pounds and limit stair climbing to the minimum necessary. The ADA provides that if the impact of an impairment on MLAs is mild, the person is not considered an individual with a disability. Following grievant’s surgical procedure, her physician imposed additional restrictions on her work activities ordering that she have five-minute breaks every hour and that she not ride in vehicles so as to avoid jarring her back. These additional restrictions increased the extent and impact of grievant’s impairment to the point that one could reasonably argue that the impairment was substantially limiting.

Assuming for the sake of discussion that grievant’s condition was sufficiently substantial to qualify as an ADA-type disability, the agency is required to make a reasonable accommodation. The ADA provides that the accommodation cannot impose an undue hardship on the agency. Moreover, if the individual cannot perform the essential functions of her job, she may not be qualified for the job. By December 2004, the agency had already accommodated grievant to a considerable extent. First, in 2003, the agency had allowed grievant to work with restrictions from October 29, 2003 through February 18, 2004. When grievant exhausted her STD benefits, the agency allowed her to continue working with restrictions until March 20, 2004. Second, in the latter half of 2004, grievant was allowed to work with restrictions from August 18 through November 16, 2004. Third, when the 90-day adjusted work assignment ended, the agency further accommodated grievant by granting a 30-day extension through December 13, 2004.

However, following the December 4, 2004 surgical procedure, grievant’s physician advised that her condition required additional restrictions beyond those already accommodated by the agency. The physician did not indicate that the restrictions were short-term or temporary; his excuse stated that he would not be reevaluating grievant until February 2005. Based on this new medical documentation, the agency concluded that it had accommodated grievant as long as it reasonably could. The agency felt that the additional restrictions imposed by the physician would be a hardship on the agency. Moreover, it had become clear that grievant’s condition prevented her from performing the essential functions of her job. A corrections officer must be able to respond to inmate disturbances and deal with unruly inmates in any part of the facility. But

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<sup>11</sup> For amplification of the qualification issues, see Agency Exhibit 3. Department of Employment Dispute Resolution (EDR) *Qualification and Compliance Ruling of Director*, No. 2005-1006, June 27, 2005.

grievant's condition prevented her from climbing stairs, lifting more than a few pounds, riding in vehicles, and required her to take breaks every hour. The sum total of these restrictions was more than the agency could reasonably accommodate because grievant was unable to perform many essential functions of her job.

Accordingly, the agency believed it had reasonably accommodated grievant as long as it could. Since the agency had no way of knowing when, or if, grievant's physician would release her to full-duty, it determined that it could not accommodate the additional restrictions. As a result, the agency did not further extend the accommodation and the TPA transitioned grievant into LTD (non-working) status on December 13, 2004. Once grievant was released to full-time work by her physician, she was free to reapply for a position through the competitive application process. Since December 2004 there have been several advertised openings at the facility for corrections officers; grievant has applied for only one of the positions.

The agency decided that it could not further accommodate grievant because she remained disabled and was unlikely to be able to resume full-duty 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, based on the physician's medical documentation, there was no reasonable likelihood that grievant would be able to return to the position within a short time.

Grievant argues that the agency could have granted her a further extension since she was released by her physician on December 21, 2004. However, grievant's argument is based on hindsight. As of December 13, 2004 when the agency determined it could no longer accommodate grievant, the *only* available medical documentation from the treating physician indicated that grievant's condition had worsened – not improved – as a result of the operation. Moreover, the physician had no plan to reevaluate grievant until two months later in February 2005. As far as the agency knew on December 13, 2004, it would be at least two additional months before the physician reevaluated grievant – and there was no assurance that her condition would have improved at that time. Certainly there was no evidence to suggest that grievant would make a sudden and complete recovery eight days later (after being told she was being moved into LTD status).

While the timing of events was not favorable to grievant, the agency had to make a decision based on the *information available on December 13, 2004*. Based on the history of grievant's condition, the previous accommodations, the extension of work adjustment, and the medical information, the agency made a reasonable determination to move grievant into LTD status until such time as she was fully released by her physician. Grievant's employment record has been satisfactory and without discipline; accordingly, she may now reapply for

available competitive openings and, if selected, return to work. Therefore, it is concluded that grievant has not borne the burden of proof to demonstrate that the agency discriminated against her on the basis of disability or any other protected classification.

Grievant has alleged administrative inconsistency but offered no specific evidence to support her allegation. Grievant also claims that she was treated unfairly but, based on the above analysis, the evidence fails to support such an allegation. Finally, grievant claims that the agency failed to communicate necessary information, however, she failed to specify what information, if any, the agency was required to communicate that it did not.

### DECISION

Grievant has not shown that the agency misapplied any policy when it transitioned her into long-term disability status. Grievant has not borne the burden of proof to support any of the allegations in her grievance. 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 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 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.<sup>12</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>13</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>12</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>13</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.