Issues: Misapplication of FMLA Policy, Misapplication of VSDP Policy, Involuntary Termination; Hearing Date: 06/28/07; Decision Issued: 07/19/07; Agency: DMHMRSAS; AHO: Thomas P. Walk, Esq.; Case No. 8614; Outcome: Full Relief: **Administrative Review: HO Reconsideration Request received 08/02/07; Reconsideration Decision issued 08/07/07; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 08/02/07; DHRM Ruling issued 10/05/07; Outcome: HO's decision affirmed; Addendum Decision addressing Attorney's fees issued 10/12/07; Amended Addendum Decision issued 10/24/07.**

COMMONWEALTH OF VIRGINIA,

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION, DIVISION OF HEARINGS,

IN RE: DEPARTMENT OF MENTAL HEALTH, MENTAL RETARDATION, SUBSTANCE ABUSE SERVICES, DEDR, CASE NO.: 8614

HEARING DATE: JUNE 28, 2007

DECISION ISSUED: JULY 19, 2007

DECISION OF HEARING OFFICER

PROCEDURAL MATTERS

The grievant submitted her Form A on December 27, 2006. The grievance was qualified for a hearing by the Director of the Department of Employment Dispute Resolution on April 6, 2007. I was appointed as hearing officer on May 21, 2007. A pre-hearing conference was conducted by telephone on May 31. 2007. A pre-hearing order was entered on June 4. The order established the hearing date of June 28. This date was selected for good cause, in light of the schedule of counsel for the grievant, namely his involvement in multi-day trial scheduled in the United States District Court for the middle part of June. The hearing was conducted at a facility operated by the agency on June 28. On July 5, I requested additional written argument from the parties on one issue raised by the grievant. The grievant and the agency have submitted written argument on that issue in line with my directive.

APPEARANCES

Grievant and Counsel

Agency Advocate and Representative

Two additional witnesses for agency

ISSUE

Whether the grievant was improperly terminated by the agency when it placed her on long-term disability status.

FINDINGS OF FACT

In the spring of 2006 the grievant suffered a tear in the tendon of her right foot. Her physician placed her in a walking boot. On May 3, 2006 she was given short term disability (STD) benefits. Those benefits continued until she returned to light-duty work on June 3, 2006. The grievant continued to work in her position as a direct service technician for a maximum of eight hours per day. On October 10 she was approved by her physician to return to work without restrictions.

The grievant found that she was continuing to experience problems with her feet. On October 16 she received a slip from her Podiatrist restricting her to working a maximum of eight hours per day and a maximum of five days per week. The grievant turned in this slip to the administrator on duty on October 20, 2006, the next day she was scheduled to work. She gave the slip to the administrator because she was unable to locate anyone in the Human Resources office with whom to leave the slip. The slip was apparently received in the Human Resources office on October 23, 2006. No official in that office was made aware, or became aware, of that slip at than time.

The grievant maintained her work schedule of eight hours per day for approximately three weeks. On November 17 she became aware of a notice sent to all facility employees that overtime restrictions could no longer be accommodated. She went to the Human Resources office to inquire about this in light of her leave slip. When the Human Resource officer was made aware of this October 16 medical slip, the agency decided to prohibit the grievant from working. The agency then established that the grievant had "rolled" into a long term disability (LTD) status as of October 25, the date on which her short term disability status expired. The grievant was referred to the insurer (UNUM Provident) for LTD benefits. The overtime restriction was lifted by her doctor as of December 21, 2006. The grievant has not been allowed to return to work since November 29, 2006.

APPLICABLE LAW AND OPINION

The agency effectively terminated the grievant from employment with the Commonwealth of Virginia at the time it converted her for STD status to LTD status. The grievant has argued that this termination resulted from an unfair or improper application of state policy. This grievance is being heard pursuant to the Virginia Grievance Procedure Manual (VGPM).

Disability benefits for Commonwealth employees are governed by the Virginia Sickness and Disability Program (VSDP). That program is administered by the Virginia Retirement System Board of Trustees. The task of developing and interpreting leave and personnel policies and procedures associated with the VSDP is left to the Virginia Department of Human Resource Management

(DHRM). DHRM Policy Number 4.57 sets forth, in detail, the DHRM policy regarding the VSDP.

Policy 4.57 defines LTD as being "an income replacement benefit that commences upon the expiration of seven calendar days waiting period and 125 work days of receipt of STD benefits." It is uncontested that the STD benefits of the grievant expired on October 25, 2006. At that time, under the policy of the facility at which the grievant was working, the grievant converted into a long term disability status. Under that status she ceased to be an employee of the Commonwealth.

This policy of the facility, however, is inconsistent with the provisions of DHRM Policy Number 4.57. That policy provides for a third type of status, Long Term Working Disability (LTD-W). LTD-W is described as "an income replacement benefit that commences upon the expiration of a seven calendar waiting period and 125 work days of receipt of STD benefits and allows employees to continue to work for their agencies from STD working status into LTD-W. In LTD-W the employee must work at least 20 hours or more per work week in his own position." The evidence clearly establishes that from October 25 through her termination on November 29 the grievant met the qualifications for LTD-W benefits. The VSDP program handbook states that an employee is eligible to receive long term disability benefits while working if he is able to work 20 or more hours a week but is restricted from performing the full duties or working a regular schedule. In contrast to employees who are considered to be

eligible for LTD benefits, those receiving LTD-W benefits are considered to remain employees of the Commonwealth.

The agency argues that the facility has a legitimate business need for its former policy of requiring for all employees to work overtime on an as-needed basis. I accept the fact that this facility, being one in which direct care of individuals with disabilities is provided, has a need for staffing to be at a certain level at all times. The former mandatory overtime policy used by the agency has been modified subsequent to the termination of the grievant. I find this change interesting, but not controlling. What I find to be controlling is that the policy of the facility not recognizing an LTD-W for employees such as the grievant is irreconcilable with the DHRM and the VSDP policies. Under the statewide policies, the grievant should have been allowed to convert to LTD-W status as of October 25, 2006. The evidence clearly supports that she was meeting the definition of such an employee.

The grievant should have been placed on LTD-W status. Under Policy 4.57 the agency is advised to review this type of status on a monthly basis to determine whether it can continue to accommodate the restrictions based on the needs of the agency. In this case, the facility chose instead to follow a blanket policy without any consideration of a possible LTD-W status.

The grievant has also argued that she was improperly denied a significant amount of protection under State and Federal law. One of the statutes on which the grievant relies is the Family and Medical Leave Act of 1993 (29 USC 2601 et seq.). The agency argues that this matter was not raised in the Form A and should

not be considered. Because protections under the FMLA are specifically referenced in Policy 4.57, I find that the grievant is entitled to protection under that statute. The policy requires that agencies "provide eligible employees with FMLA notification and they must track FMLA hours." The agency here did neither. The grievant in 2006 used only 23 days as disability leave. Therefore, under the statute she had remaining available to her 296 work hours of FMLA leave time. She would have been entitled to use those hours as leave should she have been requested to work overtime or as would have been otherwise necessary for her to protect her job should she have been unable to return to work on a regular basis. Between November 29 when she was terminated and December 21 when her physician lifted the overtime restrictions was a period of 15 work days. Therefore, the actions of the agency deprived her of the full use and advantage of her available leave time.

The grievant has further argued that denied protection by the Americans with Disabilities Act, 42 USC 12101, et seq. As with the FMLA claim, the agency has argued that this matter was not raised in the Form A and should not be considered. I find that it is proper for consideration in that an agency should not be allowed to apply a policy which may be, in a given situation, inconsistent with a Federal statute.

In this instance, however, I do not find that the statute applies. Under that law protection is given to an individual who is substantially limited in a major life activity. The grievant has argued that being on her feet and walking for extended periods of time is such an activity. Assuming that argument is correct, the

grievant still does not qualify. It is inconsistent for her to argue that she is substantially limited in that activity when the evidence has shown that she was able to perform a regular work shift for a significant period of time. Her physician placed no restriction on her activities other than working no overtime. I cannot find that not being able to work overtime constitutes a substantial limitation of a major life activity.

The question of relief to be awarded to the grievant involves one peculiar issue. The interplay between her argument that the agency violated the FMLA in terminating her seems inconsistent with a request for full back pay. If she had been using her FMLA leave, that would have been unpaid time. Therefore, I am awarding only partial back pay to the grievant.

DECISION

For the reason stated above, I hereby order the following:

1. Reinstatement of the grievant to her former position, or, if occupied, an objectively similar position;

2. The grievant shall be awarded back pay from November 29, 2006 through May 31, 2007, with the agency being allowed to subtract from those days those unused FMLA leave hours available to the grievant during that time. The agency shall further be entitled to deduct from that back pay the amount of disability benefits paid to the grievant during that time;

3. The grievant shall be restored to full benefits and annual leave; and

4. The grievant shall be entitled to an award of attorneys fees pursuant to §7.2 (E) of the Grievance Procedural Manual. Counsel shall submit his petition in accordance with that section for review by me.

APPEAL RIGHTS

As the Grievant Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director's authority is limited to ordering the hearing officer to review the decision to conform it to written policy.

3. **A challenge that the hearing decision does not comply with grievance procedure** to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision

is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date of the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Decided this July 19, 2007.

/s/Thomas P. Walk-
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Thomas P. Walk, Hearing Officer

COMMONWEALTH OF VIRGINIA,

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION, DIVISION OF HEARINGS,

IN RE: DEPARTMENT OF MENTAL HEALTH, MENTAL RETARDATION, SUBSTANCE ABUSE SERVICES, DEDR, CASE NO.: 8614

HEARING DATE: JUNE 28, 2007

DECISION ISSUED: JULY 19, 2007

DECISION UPON RECONSIDERATION ISSUED: AUGUST 7, 2007

DECISION UPON REQUEST FOR RECONSIDERATION OF DECISION

My original decision in this matter was issued on July 19, 2007. By letter dated July 27, 2007, the agency requested a reconsideration of that decision. For the reasons stated, I decline to modify the original decision.

The agency has cited three reasons why my decision was in error. The first reason given was that I disregarded "the discretion of the agency to manage its affairs as set forth in the Grievance Procedure." The agency refers me to page 27 of the DHRM Policy 4.57. My review of that page finds nothing to support the argument of the agency. I assume that the agency is referring to the section labeled "Exclusion of STD and LTD Benefits." No specific language was cited to me. I do not believe any of the provisions of that section can even implicitly support the claim of the agency.

A greater concern to me, however, is the claim that the agency has the discretion to overlook other provisions of State and Federal law. In this case, a violation of the Family Medical Leave Act was clearly shown. It is one thing for

an agency to have the power to manage its own affairs. It is another for it to argue it is a power unto itself.

I am not intending to denigrate the agency as a whole by these comments. In fact, a witness for the agency at the hearing admitted that the subject suspect policy was that of merely the facility, not an agency-wide policy. That fact does nothing to bolster the arguments of the agency.

The second argument is that no evidence was presented that the facility policy was inconsistent with DHRM Policy 4.57. The facility policy did not recognize a status of Long-Term Disability-Working. Policy 4.57 (pages 21 through 23) clearly recognizes that status. I have been presented with no possible rationale for how those two policies can be anything but inconsistent or their inconsistency reconciled.

The last argument is also curious. It is alleged that my decision "undermines VRS's authority under the Code of Virginia to manage the VSDP, enforced by the third-party administrator UNUM." As explained in my original decision, it is the agency which has ignored the VSDP which is set forth in DHRM Policy 4.57. In the letter of July 27, 2007 I am referred to a prior hearing officer's decision where the hearing officer stated "if an agency were permitted to set its own return to work rules, the VSDP would become meaningless." That quotation neatly summarizes my position. In this case, an agency, through the policies of a single facility, has attempted to rewrite the VSDP. No part of my decision tends to undermine the Virginia Sickness and Disability Program or the

ability of the agency to manage those cases in accordance with Federal and State law.

/s/ Thomas P. Walk
Thomas P. Walk, Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Mental Health Mental Retardation
and Substance Abuse Services
October 5, 2007

The Department of Mental Health, Mental, Mental Retardation and Substance Abuse Services has appealed the hearing officer's decision in Grievance No. 8614. The agency is challenging the decision because it feels that the decision is inconsistent with state/agency policies. For the reason stated below, the Department of Human Resource Management's (DHRM) will not interfere with the hearing decision. The agency head, Ms. Sara R. Wilson, has requested that I respond to this appeal.

FACTS

The Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS) employed the grievant as a Direct Support Associate at one of its facilities until she was removed on November 29, 2006. On that date she was informed that she was placed on long term disability which essentially terminated her employment from the facility.

The grievant suffered an injury to her right foot in the spring of 2006. In May 2006 she went on short term disability (STD). She returned to light-duty work on June 3, 2006, with a work restriction of eight hours per day. On October 10, 2006, she was released to full-duty work with no restrictions. However, she continued to experience pain so her podiatrist placed her on medical restrictions on October 16, limiting her again to eight hours per day five days a week. She gave the medical notice to an administrator because there was no one available in the Human Resource Office. The Human Resource Office received the note on October 23, 2006. The grievant assumed her eight-hour per day work schedule on October 16, 2006, the date of the medical restrictions for eight hour days. On November 17, 2006, she became aware of a notice sent to all employees which stated that overtime restrictions would no longer be accommodated. In light of her eight-hour work day restriction, she inquired about her status. When the Human Resource officer became aware of the October 16, 2006, note with the restrictions, the agency decided to prohibit the grievant from working. The agency then established, through UNUM, that the grievant had "rolled" into long term disability (LTD) status as of October 25, 2006, the date her STD expired. The grievant has not been allowed to work since November 29, 2006. The overtime restriction was lifted by her doctor on December 21, 2006, well after she was placed on LTD.

The grievant challenged her placement on LTD and termination by filing a grievance. When she did not receive the relief she was seeking through the management steps of the grievance process, she requested that her grievance be heard by a hearing officer. The hearing officer determined that the policy was inconsistent with DHRM Policy No. 4.57-Virginia Sickness and Disability Program Leave. In summary, DHRM Policy No. 4.57 provides for Long Term Disability-Working, whereas the facility's Instruction 120 does not.

The relevant policy, the Department of Human Resource Management's Policy No. 4.57 states as its purpose:

> Provides eligible employees supplemental replacement income during periods of partial or total disability for both non-occupational and occupational disabilities. Encourages rehabilitation with an ultimate goal to return employees back to gainful employment when medically able. Provides employees with sick and family and personal leave.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. Based on the evidence, the hearing officer determined that the provisions of the facility Instruction 120 regarding LTD-W and DHRM Policy No. 4.57 are in conflict. Whereas the facility Instruction 120 does not recognize LTD–W as an alternative in returning an employee to full and productive employment, DHRM Policy No. 4.57 lists LTD-W as such an alternative as long as the employee works at least 20 hours per workweek.

This administrative ruling addresses the issue of whether the agency's policy and DHRM policy are in contradiction and, if so, which policy prevails.

DHRM Policy 4.57 states, in relevant part, LTD-W status is in effect when:

- Employees working during STD (modified schedule or with restrictions) continue to work from STD status into LTD for 20 hours or more per workweek in their full-time position
- Qualified part-time employees working during STD (modified schedule or with restrictions) continue to work for their agency LTD for 20 or more hours per workweek in their own part-time position.

The policy further states, "Employees in LTD-W are considered employees of the Commonwealth. Agencies should review this status every month to determine if they can continue to accommodate the restrictions based on agency business needs. Agencies should also review for compliance with ADA.

- Employees must continue to work 20 hours or more per week to maintain LTD-W status.
- LTD-W is intended to be a short-term transitional work situation where the employee is working towards full return to work with no restrictions.

Note: Employees who move to LTD cannot return to LTD-W status."

The relevant part of the facility's Instruction 120, Section 3.J. states, "Employees who are not able to return to their regularly assigned positions after medical recovery as certified by the

licensed treating professional/panel physician will be evaluated and may be subject to a reasonable accommodation analysis to determine their employment status. SWVTC does not accommodate Long Term Disability Working."

In the instant case, according to medical documentation the grievant was placed on medical restrictions (eight hours per day, five days per week) on October 16, 2006. The Human Resource Office became aware on or about October 23, 2006, that she was on this restricted duty. After collaborating with UNUM, it was determined that her STD had expired and she was "rolled" into LTD, retroactive to October 25, 2006. She was put on LTD and sent home, effective November 29, 2006. Her physician released her to perform full-duty on December 21, 2006, well after she was put on LTD.

Concerning whether the facility's policy is in contradiction with DHRM policy, we offer the following. DHRM Policy No. 4.57 provides that employees who are on STD and working at least 20 hours per work week in their full-time positions be given LTD-W status. Conversely, facility Instruction 120 states, in part, "SWVTC does not accommodate Long Term Disability Working." This is clearly in conflict with DHRM policy in that Instruction 120 denies a benefit granted to employees by DHRM Policy No. 4.57. DHRM Policy 4.57 provides an opportunity for agencies to use LTD-W as an alternative in returning employees to full productivity. Conversely, Instruction 120 is a blanket policy and removes the option to treat each situation on a case by case basis. In such a situation, the prevailing policy is Policy No. 4.57. Thus, this Agency has no reason to interfere with the hearing officer's decision.

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Ernest G. Spratley

IN THE MATTER OF

GRIEVANCE WITH THE
DEPARTMENT OF MENTAL HEALTH, MENTAL RETARDATION,
SUBSTANCE ABUSE SERVICES,

CASE NO.: 8614

ISSUED JULY 19, 2007

DECISION UPON RECONSIDERATION

ISSUED AUGUST 7, 2007

ADDENDUM TO DECISION

ISSUED OCTOBER 12, 2007

COMMONWEALTH OF VIRGINIA,

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION, DIVISION OF HEARINGS,

ADDENDUM TO DECISION OF HEARING OFFICER

IN RE: CASE NO.: 8614

HEARING DATE: JUNE 28, 2007

DECISION ISSUED: JULY 19, 2007

RECONSIDERATION DECISION ISSUED: AUGUST 7, 2007

ADDENDUM ISSUED: OCTOBER 12, 2007

APPLICABLE LAW AND PROCEDURE

Section 2.2-3005.1 of the Code of Virginia of 1950, as amended, provides that in a grievance hearing challenging a discharge a hearing officer shall award reasonable attorneys fees if the employee "has substantially prevailed on the merits of the grievance." Section 7.2 (E) of the Grievance Procedure Manual requires that for an employee to "substantially prevail" the decision of the hearing officer must reinstate the employee to his former or an objectively similar position. By my original ruling rendered on July 19, 2007 I found that the grievant had been improperly terminated and should be reinstated to employment. Upon the request of the agency, I reconsidered the matter and entered a further ruling on August 17, 2007. That ruling found no basis for modifying the reinstatement ruling. On August 1, 2007 counsel for the grievant submitted a petition for an award of attorneys fees in the amount of $3,000.00. On October 5,

2007 the Department of Human Resource Management issued its Policy Ruling in this matter, finding "no reason to interfere with the hearing officer's decision."

DISCUSSION AND DECISION

The grievant was successful in being reinstated to her employment with the agency. Therefore, under the applicable law she substantially prevailed and is entitled to an award of attorneys fees. Counsel has requested payment for 18.50 hours of services rendered. To determine the reasonableness of the time extended in this matter, I have considered the nature of the facts and complexity of the legal issues.

The facts of the case are straight forward and, to the extent relevant, undisputed. Despite my suggestions to do so, the parties were unable to stipulate to them. The facts as proven at the hearing are as set forth in the agency documents. Therefore, I decline to find that counsel spent excessive amount of time in preparing to present or rebut evidence. In fact, the agency has not challenged the reasonableness of the time submitted by counsel nor the form of the petition.

The legal issues, as set forth in my initial ruling and the ruling on the request for reconsideration, are more complicated than typically found in a grievance hearing. The interplay between Federal law, State law, and individual agency and facility policy required more than a cursory amount of research. Again, the agency has made no objection to the amount of time expended.

The office of counsel for the grievant is not located in Northern Virginia. Pursuant to the Rules for Conducting Grievance Hearings I am limited to awarding fees at the rate of $120.00 per hour. I have no authority to order reimbursement for the claimed mileage. According, I hereby make an award of attorneys fees in the amount of $2,220.00 payable by the agency to counsel for the grievant.

ENTERED this October 12, 2007.

/s/ Thomas P. Walk_____
Thomas P. Walk, Hearing Officer

COMMONWEALTH OF VIRGINIA,

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION, DIVISION OF HEARINGS,

IN RE: CASE NO.: 8614

HEARING DATE: JUNE 28, 2007

DECISION ISSUED: JULY 19, 2007

RECONSIDERATION DECISION ISSUED: AUGUST 7, 2007

ADDENDUM ISSUED: OCTOBER 12, 2007

AMENDMENT ISSUED: OCTOBER 24, 2007

AMENDMENT TO ADDENDUM

In my addendum ruling on the Petition for the request of attorneys fees I incorrectly stated that the maximum rate of compensation in this case was $120.00 per hour. I have now been made aware that the actual maximum rate for this case is $127.00 per hour. Therefore, I hereby amend my award on behalf of the grievant to the total amount of $2,349.50.

ORDERED this October 24, 2007.

/s/Thomas P. Walk

Thomas P. Walk, Hearing Officer