Issue: Misapplication of Policy (VSDP); Hearing Date: 09/13/10; Decision Issued: 09/30/10; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 9381; Outcome: Full Relief; **Administrative Review: EDR Ruling Request received 10/14/10; EDR Ruling No. 2011-2809 issued 11/29/10; Outcome: Hearing Decision Affirmed; Administrative Review: DHRM Ruling Request received 10/14/10; DHRM Ruling issued 02/18/11; Outcome: Remanded to AHO; Remand Decision issued 03/08/11; Outcome: Original Decision Reversed; Administrative Review: AHO Reconsideration Request to 03/08/11 Remand Decision received; Reconsideration Decision issued 04/05/11; Outcome: Remand Decision of 03/08/11 Affirmed.**

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

RE: DEDR CASE NO.: 9381

DECISION OF HEARING OFFICER

HEARING DATE: September 13, 2010
DECISION ISSUED: September 30, 2010

PROCEDURAL BACKGROUND

The grievant initiated this matter with the Department of Corrections on June 15, 2009. Her Form A alleged, among other things, sex discrimination and errors in application of the State/DOC leave policy resulting in her termination. The Director of the agency determined the matters as not qualified for a hearing by ruling dated August 12, 2009. The grievant appealed that decision to the Director of the Department of Employment Dispute Resolution on August 17, 2009. The Director of DEDR ruled on March 1, 2010 that the issues raised by the grievant did not qualify for a hearing. The grievant appealed that decision to the Circuit Court for the locality in which the agency facility at which she was employed previously was located. After a hearing on April 26, 2010, the Judge of the Circuit Court entered an Order on May 24 qualifying for hearing the issue of an unfair or misapplication of policy. He withheld a ruling upon a claim of sex discrimination.

I was appointed as hearing officer on July 26, 2010. I conducted a pre-hearing telephonic conference on August 2. Counsel for the grievant requested and was granted an extension of the decision in this matter for good cause. I conducted a hearing at the agency facility on September 13. On September 16, I wrote to counsel for the grievant and the agency advocate requesting a clarification of certain facts and of the legal issues involved. Both provided to me the requested information and argument by the deadline of September 23.

APPEARANCES

Grievant

Counsel for Grievant

One Additional Witness for Grievant

Agency Advocate

Agency Representative

Three Witnesses for Agency

ISSUE

Whether the agency improperly placed the grievant on Long-Term Disability status and removed her from active employment with the agency pursuant to Department of Human Resource Management Policy 4.57?

FINDINGS OF FACT

The grievant began working for the Virginia Department of Corrections as a Correctional Officer on August 8, 2002. She continued her employment with that agency on a full-time basis until the events giving rise to this grievance occurred. Her employment status entitled her to participate in the Virginia Sickness and Disability Program. The Virginia Retirement System administers that program. A private company, UNUM, serves as the third-party administrator for the program. The program provides income replacement benefits for covered employees classified as either having a Short-Term Disability ("STD") or Long-Term Disability ("LTD"). Short-Term Disability benefits are available, after a 7-calendar day waiting period, to a disabled employee for a maximum of 125 workdays. Long-Term Disability benefits commence upon the expiration of the 7 calendars day waiting period and 125 workdays of STD benefits. A disability is defined as "an illness or injury or other medical condition, including pregnancy, that prevents

an employee from performing the duties of his or her job." A disability can be total or partial. The program is set forth in Policy No. 4.57 of the Department of Human Resource Management ("DHRM").

Shortly before September 16, 2008, the grievant injured one of her legs. She contacted UNUM and applied for STD benefits under the program. UNUM approved the claim and provided benefits to the grievant until November 19, 2008. On the following day, the grievant was returned to work under the agency Return To Work ("RTW") program. That program allows employees with restrictions to work in a light-duty capacity, subject to certain further conditions. The RTW policy provides for participation of a maximum of 90 days. It is designed to correlate with DHRM Policy 4.57.

UNUM approved the payment of benefits to the grievant through November 19, 2008. On that date a Senior Vocational Rehabilitation Consultant with UNUM provided to the agency notice that the grievant had been released to return to work on the following day. This return was conditioned on the following restrictions: no running, minimal climbing, limit to desk work, no driving more than two hours, away from inmates, work eight hours per day. On that same day, UNUM, through a Disability Benefits Specialist, notified the grievant that it was approving the restrictions through January 13, 2009. UNUM stated that benefits could not be extended beyond January 13, 2009 unless the grievant submitted additional medical information to it. If that information was not received, the file would be closed.

Upon her returning to work, the agency placed the grievant in a position at the Walk-Through Sally Port. This post carried with it generally lighter duties than that of a yard officer, the post previously held by the grievant. The agency placed her on a schedule of working 8 hours per day, 5 days per week. This schedule was a change from her prior schedule of working

12-hour shifts totaling 80 hours over a standard two-week pay period. The agency continued working the grievant at this post until early April 2009. While working the Sally Port, the grievant climbed a set of stairs on a regular and frequent basis. She would assist the yard officers, and helped in the counting of inmates. She had regular contact with inmates and was not limited to deskwork.

Continuing problems with her leg forced the grievant to need surgery on it in early April 2009. She again contacted UNUM regarding a Short-Term Disability claim. UNUM responded on April 27 approving the claim but stating that the benefits would end on March 16, 2009 [sic]. The letter from the Disability Benefits Specialist for UNUM stated that her file was being reviewed for LTD consideration. This letter was from the same specialist who had sent the letter of November 19, 2008 setting the cutoff for benefits as January 13, 2009.

An Employee Benefits Manager for the agency wrote to the grievant on April 30 advising her that she was being transitioned to Long-Term Disability status. Because of this transition, the grievant lost her position with the agency. Upon her being able to return to work at a full-time, full-duty position, she was eligible to apply for available positions through the normal recruitment process. The transition was based on a determination that her light-duty status ended on April 27, 2008. UNUM has paid to the grievant LTD benefits for approximately one month, April 28, 2009 through May 26, 2009.

APPLICABLE LAW AND DECISION

Chapter 30 of Title 2.2 of the Code of Virginia of 1950, as amended provides a process for eligible employees of the Commonwealth of Virginia to challenge certain adverse employment actions taken by the employing agency. The Department of Employment Dispute Resolution ("DEDR") administers the grievance procedure. It has promulgated a Grievance

Procedural Manual ("GPM"). The GPM sets forth terms and conditions respecting grievances. Section 4.1(b) (1) allows a grievant to challenge an adverse employment action resulting from an unfair application or misapplication of state or agency personnel policies. Section 4.4 of the GPM specifies that a grievance filed under this section does not automatically qualify for a hearing. Upon the adverse decisions by the agency head and the DEDR Director, the employee may appeal to a Circuit Court. As stated above, that is the winding route taken in this matter. The Circuit Court Judge ruled that only the question of an unfair or misapplication of policy was grievable. Because he withheld any ruling on the matter of sex discrimination, I do not make any determinations with regard to that issue.

The policy that the grievant claims was unfairly or misapplied is DHRM Policy No. 4.57. Pursuant to Section 5.8 of the GPM, the grievant has the burden of proof by a preponderance of the evidence. I conclude that the grievant has met this burden.

In comparing the arguments presented by the parties, they have essentially reduced this matter to the single issue of whether the grievant was fully returned to work on a pre-disability basis prior to March 16, 2009. The grievant asserts that she was working without restrictions because those restrictions were not being honored by the agency. She further asserts that she was working full-time because her total hours during a pay period equaled those of her pre-disability schedule.

The agency, on the other hand, asserts that the grievant was never medically cleared to return to employment and that the change in her posts and schedule are determinative of her status. At the hearing, the agency argued that under the VSDB the burden of taking affirmative action was on the grievant with regard to complying with the program. This argument is entirely consistent with the letter of November 19, 2008 from the Disability Benefits Specialist to the

grievant notifying her that her benefits could not be extended beyond January 13, 2009 unless she provided additional information. No evidence was presented that the grievant presented that additional information.

The agency further asserts that the entitlement of the grievant to STD benefits ended on March 16, 2009. That date was merely an administrative fictitious date based on the date of September 16, 2008 for the beginning of benefits and calculating 125 workdays forward from the earlier date. My interpretation of the policy is that March 16 is the latest date on which the grievant could have received Short-Term Disability benefits based on her initial filing. I find, however, that her eligibility under that claim ended on January 13, 2009 as specified by UNUM. Therefore, based on that finding, the grievant should not have been transitioned to LTD status because she had been eligible for STD benefits for less than 125 work days as set forth in the applicable policy.

The argument of the agency further ignores the actual work of the grievant commencing November 20, 2008 and continuing thereafter until April 2009. As stated above, the grievant was working with many duties required of her in violation of the restrictions imposed by UNUM on November 19, 2008. I find it significant that the Chief of Security for the facility, when asked about whether the Sally Port position was "light-duty," responded strictly in terms of the eight-hour workday. The testimony of the grievant regarding her additional duties was largely uncontradicted. I view the testimony of the Chief of Security as being at least implicitly a corroboration of the testimony of the grievant. Therefore, I cannot find that the grievant was not working full-time, full-duty on March 16, 2009. I find that she was improperly transitioned to a LTD status on April 27, 2009 to the extent that the agency relied on that determination.

In addition to the reasons cited above, I also find that the action of the agency ignores the plain wording of Policy 4.57. The definition of a "Long-Term Disability benefit" speaks in terms of 125 workdays "of receipt (emphasis mine) of STD benefits." If the grievant was eligible for STD benefits from September 16, 2008 through March 16, 2009, it is undisputed that she did not receive benefits for those 125 workdays.

Policy 4.57 is designed to implement Chapter 11 of Title 51.1 of the Code of Virginia. Section 51.1-1112(A) of the Code provides that Long-Term Disability benefits shall commence upon the expiration of the maximum period that an employee is eligible (emphasis added) to receive Short-Term Disability benefits. For me to accept the argument of the Department of Corrections in this matter that the grievant was properly transitioned to Long-Term Disability benefits would require me to find that DHRM Policy 4.57 is inconsistent with the statute and should be ignored. The policy clearly distinguishes between being eligible for benefits and actually receiving those benefits. The latter is specifically stated to be the triggering condition for placing an employee into long-term disability status.

It is well established that a public official is presumed to have acted properly in the discharge of his public duties. United States v. Chemical Foundation, Inc., 272 U.S. 1, 14, 15, (1926). I will presume that the Department of Human Resource Management in drafting Policy 4.57 so acted regularly and consistently with the statutory mandates. In accordance with that presumption, I interpret Policy 4.57 as being consistent with the intent of the statute.

The grievant presented evidence that two male employees at the facility were also working with physical disabilities that the agency had accommodated by modifying their duties and allowing them to work eight hour shifts. I do not find that the grievant has presented

sufficient evidence with regard to the actual conditions of these employees to establish an "unfair" application of Policy 4.57.

The grievant has also requested that an award of attorney's fees be made to her if she is successful in this grievance. DEDR has also promulgated "Rules for Conducting Grievance Hearings." Section V(D) of the Rules allows for an award of attorneys fees under certain limited circumstances. One of the conditions for such an award is that the employee be challenging his discharge from employment. Although I understand the argument that the actions taken by the agency here were tantamount to a discharge, I do not find that I have the jurisdiction to award attorneys fees in this matter challenging the misapplication of policy.

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. Requests should be

sent to the Director of Human Resources Management, 101 N. 14th St., 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made 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. Requests should be sent to the EDR Director, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804) 786-0111.

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 **15 calendar** days of the **date of the original hearing decision**. 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 15 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 DEDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The court shall award reasonable attorneys= fees and costs to the employee if the employee

substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code ' 17.1-405.

DECISION

For the reasons stated herein, I find that the agency misapplied DHRM Policy 4.57 in transitioning the grievant to Long-Term Disability status and removing her from her position at the facility where she formerly worked. The agency is hereby directed to restore her to her former position or, if occupied, to an objectively similar position. I award full back pay from which the LTD benefits received and her interim earnings must be deducted. She shall further be restored to full benefits and seniority.

RENDERED this September 30, 2010.

/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 Corrections
February 18, 2010

The agency has requested an administrative review of the hearing decision in Grievance No. 9381. In its challenge, the agency is requesting a review by this Agency because it believes "that the hearing Officer's decision is inconsistent with state and agency policy, and more particularly does not comply with DHRM Policy 4.57-Virginia Sickness and Disability Program, which is administered by the Virginia Retirement System." For the reason stated below, the Department of Human Resource Management (DHRM) remands the hearing decision to the hearing officer. The agency head, Ms. Sara R. Wilson, has requested that I respond to this appeal.

FACTS

In his **Findings of Fact**, in part, the hearing officer stated the following:

> The grievant began working for the Virginia Department of Corrections as a Correctional Officer on August 8, 2002. She continued her employment with that agency on a full-time basis until the events giving rise to this grievance occurred. Her employment status entitled her to participate in the Virginia Sickness and Disability Program. The Virginia Retirement System administers that program. A private company, UNUM, serves as the third-party administrator for the program. The program provides income replacement benefits for covered employees classified as either having a Short-Term Disability ("STD") or Long-Term Disability ("LTD"). Short-Term Disability benefits are available, after a 7-calendar day waiting period, to a disabled employee for a maximum of 125 workdays. Long-Term Disability benefits commence upon the expiration of the 7 calendar day waiting period and 125 workdays of STD benefits. A disability is defined as "an illness or injury or other medical condition, including pregnancy that prevents an employee from performing the duties of his or her job." A disability can be total or partial. The program is set forth in Policy No. 4.57 of the Department of Human Resource Management ("DHRM"). Shortly before September 16, 2008, the grievant injured one of her legs. She contacted UNUM and applied for STD benefits under the program. UNUM approved the claim and provided benefits to the grievant until November 19, 2008. On the following day, the grievant was returned to work under the agency Return To Work ("RTW") program. That program allows employees with restrictions to work in a light-duty capacity, subject to certain further conditions. The RTW policy provides for participation of a maximum of 90 days. It is designed to correlate with DHRM Policy 4.57.
>
> UNUM approved the payment of benefits to the grievant through November 19, 2008. On that date a Senior Vocational Rehabilitation Consultant with UNUM provided to the agency notice that the grievant had been released to return to work on the following day. This return was conditioned on the following restrictions: no running, minimal climbing, limit to desk work, no driving more than two hours, away from inmates, work eight hours per day. On that same day, UNUM, through a Disability Benefits Specialist, notified the grievant that it was approving the restrictions through January 13, 2009. UNUM stated that benefits could not be

extended beyond January 13, 2009 unless the grievant submitted additional medical information to it. If that information was not received, the file would be closed.

Upon her returning to work, the agency placed the grievant in a position at the Walk -Through Sally Port. This post carried with it generally lighter duties than that of a yard officer, the post previously held by the grievant. The agency placed her on a schedule of working 8 hours per day, 5 days per week. This schedule was a change from her prior schedule of working 12-hour shifts totaling 80 hours over a standard two-week pay period. The agency continued working the grievant at this post until early April 2009. While working the Sally Port, the grievant climbed a set of stairs on a regular and frequent basis. She would assist the yard officers, and helped in the counting of inmates. She had regular contact with inmates and was not limited to deskwork.

Continuing problems with her leg forced the grievant to need surgery on it in early April 2009. She again contacted UNUM regarding a Short-Term Disability claim. UNUM responded on April 27 approving the claim but stating that the benefits would end on March 16, 2009 [sic]. The letter from the Disability Benefits Specialist for UNUM stated that her file was being reviewed for LTD consideration. This letter was from the same specialist who had sent the letter of November 19, 2008 setting the cutoff for benefits as January 13, 2009.

An Employee Benefits Manager for the agency wrote to the grievant on April 30 advising her that she was being transitioned to Long-Term Disability status. Because of this transition, the grievant lost her position with the agency. Upon her being able to return to work at a full-time, full-duty position, she was eligible to apply for available positions through the normal recruitment process. The transition was based on a determination that her light-duty status ended on April 27, 2008. UNUM has paid to the grievant LTD benefits for approximately one month, April 28, 2009 through May 26, 2009.

APPLICABLE LAW AND DECISION

Chapter 30 of Title 2.2 of the Code of Virginia of 1950, as amended, provides a process for eligible employees of the Commonwealth of Virginia to challenge certain adverse employment actions taken by the employing agency. The Department of Employment Dispute Resolution ("DEDR") administers the grievance procedure. It has promulgated a Grievance Procedural Manual ("GPM"). The GPM sets forth terms and conditions respecting grievances. Section 4.1(b) (1) allows a grievant to challenge an adverse employment action resulting from an unfair application or misapplication of state or agency personnel policies. Section 4.4 of the GPM specifies that a grievance filed under this section does not automatically qualify for a hearing. Upon the adverse decisions by the agency head and the DEDR Director, the employee may appeal to a Circuit Court. As stated above, that is the winding route taken in this matter. The Circuit Court Judge ruled that only the question of an unfair or misapplication of policy was grievable. Because he withheld any ruling on the matter of sex discrimination, I do not make any determinations with regard to that issue."

The policy that the grievant claims was unfairly or misapplied is DHRM Policy No. 4.57. Pursuant to Section 5.8 of the GPM, the grievant has the burden of proof by a preponderance of the evidence. I conclude that the grievant has met this burden. In comparing the arguments presented by the parties, they have essentially reduced this matter to the single issue of whether the grievant was fully returned to work on a pre-disability basis prior to March 16, 2009. The grievant asserts that she was working without restrictions because those restrictions were not being honored by the agency. She further asserts that she was working full-time because her total hours during a pay period equaled those of her pre-disability schedule. The agency, on the other hand, asserts that the grievant was never medically cleared to return to employment and that the change in her posts and schedule are determinative of her status. At the hearing, the agency argued that under the VSDB the burden of taking affirmative action was on the grievant with regard to complying with the program. This argument is entirely consistent with the letter of November 19, 2008 from the Disability Benefits Specialist to the grievant notifying her that her benefits could not be extended beyond January 13, 2009 unless she provided additional information. No evidence was presented that the grievant presented that additional information.

The agency further asserts that the entitlement of the grievant to STD benefits ended on March 16, 2009. That date was merely an administrative fictitious date based on the date of September 16, 2008 for the beginning of benefits and calculating 125 workdays forward from the earlier date. My interpretation of the policy is that March 16 is the latest date on which the grievant could have received Short-Term Disability benefits based on her initial filing. I find, however, that her eligibility under that claim ended on January 13, 2009 as specified by UNUM. Therefore, based on that finding, the grievant should not have been transitioned to LTD status because she had been eligible for STD benefits for less than 125 work days as set forth in the applicable policy.

The argument of the agency further ignores the actual work of the grievant commencing November 20, 2008 and continuing thereafter until April 2009. As stated above, the grievant was working with many duties required of her in violation of the restrictions imposed by UNUM on November 19, 2008. I find it significant that the Chief of Security for the facility, when asked about whether the Sally Port position was “light-duty,” responded strictly in terms of the eight-hour workday. The testimony of the grievant regarding her additional duties was largely uncontradicted. I view the testimony of the Chief of Security as being at least implicitly a corroboration of the testimony of the grievant. Therefore, I cannot find that the grievant was not working full-time, full-duty on March 16, 2009. I find that she was improperly transitioned to a LTD status on April 27, 2009 to the extent that the agency relied on that determination.

In addition to the reasons cited above, I also find that the action of the agency ignores the plain wording of Policy 4.57. The definition of a “Long-Term Disability benefit” speaks in terms of 125 workdays “of receipt (emphasis mine) of STD benefits.” If the grievant was eligible for STD benefits from September 16, 2008 through March 16, 2009, it is undisputed that she did not receive benefits for those 125 workdays. Policy 4.57 is designed to implement Chapter 11 of Title 51.1 of the Code of Virginia. Section 51.1-1112(A) of the Code provides that Long-Term Disability benefits shall commence upon the expiration of the maximum period that

> an employee is eligible (emphasis added) to receive Short-Term Disability benefits. For me to accept the argument of the Department of Corrections in this matter that the grievant was properly transitioned to Long-Term Disability benefits would require me to find that DHRM Policy 4.57 is inconsistent with the statute and should be ignored. The policy clearly distinguishes between being eligible for benefits and actually receiving those benefits. The latter is specifically stated to be the triggering condition for placing an employee into long-term disability status.
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> It is well established that a public official is presumed to have acted properly in the discharge of his public duties. United States v. Chemical Foundation, Inc., 272 U.S. 1, 14, 15, (1926). I will presume that the Department of Human Resource Management in drafting Policy 4.57 so acted regularly and consistently with the statutory mandates. In accordance with that presumption, I interpret Policy 4.57 as being consistent with the intent of the statute. The grievant presented evidence that two male employees at the facility were also working with physical disabilities that the agency had accommodated by modifying their duties and allowing them to work eight hour shifts. I do not find that the grievant has presented sufficient evidence with regard to the actual conditions of these employees to establish an "unfair" application of Policy 4.57.

DISCUSSION

The Department of Human Resource Management offers the following in response to the Department of Corrections' request for an administrative review. 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. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is beyond the limit of reasonableness, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or by the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

The relevant policy, the Department of Human Resource Management's Policy No. 4.57, Virginia Sickness and Disability Program, "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." In addition, the Department of Corrections has promulgated DOC Operating Procedure 135.1, to address employees' return to work issues.

In his **Decision**, the hearing officer wrote the following:

> For the reasons stated herein, I find that the agency misapplied DHRM Policy 4.57 in transitioning the grievant to Long-Term Disability status and removing her from her position at the facility where she formerly worked. The agency is

> hereby directed to restore her to her former position or, if occupied, to an objectively similar position. I award full back pay from which the LTD benefits received and her interim earnings must be deducted. She shall further be restored to full benefits and seniority.
>
> In its appeal, the DOC contends,
>
> "The Hearing Officer appears to have come to his conclusion on when [Grievant's] STD ended based on two things: a letter from Unum to the Grievant dated November 19, 2008, and [Grievant's] personal testimony that she was working full duty when she returned to work with restrictions on November 20, 2008."
>
> DOC's appeal continues,
>
> "Unum's letter to Grievant dated November 19, 2008, in no way states that her claim is being closed as of that date. The letter provides information concerning the Grievant's modifications for the period November 20, 2008 through January 13, 2009. It further states that, "If you are able to return to work full-time full-duty before January 14, 2009, please contact us immediately." It further states "If you cannot return to work full-time full-duty on January 14, 2009 for medical reasons, your attending physician(s) must provide us with the medical information below to support your disability." This same letter to the Grievant goes on to state "Please be advised that your Human Resource department requires that you present a return to work slip signed by your physician on the day that you are releases to return to work", reminding [Grievant] that it is her responsibility to get a return to work slip."

The issue before the Department of Human Resource Management is whether the DOC erroneously placed the Grievant on LTD. According to the evidence, the Grievant originally was assigned to a position that required to alternate working two 12-hour shifts one week and five 12-hour shifts the next week. For her original position, that constituted full-time full-duty. After she broke her foot, she returned to work on November 20, 2009, under the return-to-work program. She was assigned to a 90-day transitional position in the Sally Port and worked eight hour days five days a week. In accordance with her physician's instructions, her return to work was conditioned on the following restrictions: no running, minimal climbing, limit to desk work, no driving more than two hours, away from inmates, work eight hours per day. On that same day, UNUM, through a Disability Benefits Specialist, notified the grievant that it was approving the restrictions through January 13, 2009. UNUM stated that benefits could not be extended beyond January 13, 2009 unless the grievant submitted additional medical information to it. This schedule was a change from her prior schedule of working 12-hour shifts totaling 80 hours over a standard two-week pay period. The grievant never provided the required medical documentation. In reality, the agency continued working the grievant at this post until early April 2009. While working the Sally Port, the grievant climbed a set of stairs on a regular and frequent basis. She would assist the yard officers, and helped in the counting of inmates. She had regular contact with inmates and was not limited to deskwork. She worked in the return to work position until April 2009, far beyond the January 13, 2009 date originally set for the transition position to end.

The Grievant went out on leave a second time on April 27, 2009. She was in the same return to work position she held upon her return from her original injury. She went on additional leave because of surgery on the same leg. She was notified on April 30, 2009 that she was

transitioned to LTD. According to DOC correspondence, she had not provided medical clearance to return to work as in her original position full-time full-duty.

According DHRM Policy No. 4.57, a new period of STD begins when

- Return to work full-time/full duty for 14 or more consecutive calendar days after a non-chronic condition, but cannot continue to work, or
- Return to work full time/full duty for 28 or more consecutive days for a major chronic condition, but cannot continue to work, or
- Experience a new disability or illness during the 14 calendar day period, or 28 calendar day period, unrelated to the first condition

In addition, work arranged through a vocational, rehabilitation, or return-to-work program, where the employee has not been released by his physician full-time/full-duty, does not count towards days worked when determining if a new disability exists. The employee is still considered disabled and on STD. However, all days worked or not worked count towards the transition into LTD.

According to the evidence, the grievant had not been cleared by her physician to return to work full-time full-duty. Therefore, Unum transitioned the grievant to LTD. The definition of disability in VSDP policy is, "An illness or injury or other medical condition, including pregnancy that prevents an employee from performing the duties of his or her job. A disability can be total or partial." This language is clear that an employee shall be considered as disabled until he returns to work full-time, full-duty to his pre-disability job. In the present case, the employee was being accommodated in a "light duty" position through the end of the 125 day STD period. Therefore, the employee technically was in an LTD-Working status for a period of time when she needed to have additional surgery. LTD-W is in effect when employees working during STD (modified schedule or with restrictions) continue to work for their agency STD working status into LTD for 20 hours or more per workweek in their own full-time position. LTD status is in effect when (1) the employee has received the maximum STD benefit and is unable to return to work; (2) the employee is working any schedule outside their agency; or (3) the employee is unable to continue working 20 hours a week in LTD-W.

According to the agency, the grievant's STD benefits expired on March 16, 2009. Because she continued to work for the agency for more than 20 hours per week as a corrections officer, with restrictions, she effectively rolled into LTD-W. On April 28, 2009, when she was unable to continue to work because of the continuing leg problem, she was rolled into LTD status. As such, the grievant's separation from state service as a result of her being rolled into LTD was not a misapplication of state policy.

Based on the foregoing information, the DHRM is remanding the decision to the hearing officer to revise his decision to conform to the provisions of policy.

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Ernest G. Spratley

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

RE: DEDR CASE NO.: 9381

REVISED DECISION OF HEARING OFFICER

HEARING DATE: September 13, 2010
DECISION ISSUED: September 30, 2010
REVISED DECISION ISSUED: March 8, 2011

I issued my original decision in this matter on September 30, 2010. That decision included my findings that the Department of Corrections had improperly terminated the grievant from employment with the agency. My ruling was based on my interpretation of Policy No. 4.57 of the Department of Human Resource Management (DHRM). On October 14, 2010 the agency requested reviews of my decision by the Department of Employment Dispute Resolution and by the Department of Human Resource Management. The director of the Department of Employment Dispute Resolution ruled on November 29, 2010 that her department was without jurisdiction to conduct an administrative review of my decision.

On February 18, 2011, the assistant director of the Department of Human Resource Management issued its Policy Ruling in this matter. The Department has interpreted its Policy 4.57 as equating the phrase "his or her job" with the pre-disability job of the employee. Under well-established principals of Virginia law, I must give due deference to the interpretation by the agency of its own regulation or policy, so long as not arbitrary or capricious.

It is undisputed that the grievant had not returned to her pre-disability duties or schedule. Although she was working a full time schedule as a

corrections officer, under the interpretation given the word "disability" by DHRM the grievant was working with a status of Long-Term Disability-Working. As such, when the grievant needed a second period of leave for the same physical condition as originally caused her Short-Term Disability status, the agency was entitled to transition her to the status of Long-Term Disability. The interpretation of Policy 4.57 allows for the termination of the grievant from employment.

The Ruling by DHRM does not address all portions of my original ruling, including what impact the absence of Short-Term Disability benefits being paid to the grievant had on her status. I believe that the terms of Policy 4.57 are ambiguous. This ambiguity, however, does not render the interpretation of the Policy by DHRM as being arbitrary or capricious. Therefore, I must follow the interpretation of the Policy given it by the agency. Under that interpretation, the agency acted appropriately in terminating the employment of the grievant.

DECISION

I hereby incorporate the findings of fact and analysis contained in my original decision of September 30, 2010 to the extent that such analysis does not conflict with my findings and rulings made herein. I hereby uphold the decision by the Department of Corrections to terminate the grievant from employment and dismiss her grievance.

APPEAL RIGHTS

As the Grievance 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. Requests should be sent to the Director of Human Resources Management, 101 N. 14th St., 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made 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. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main St., Suite 301, Richmond, VA 23219 or faxed to (804) 786-0111.

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 **15 calendar** days of the **date of the original hearing decision**. 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 15 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.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The court shall award reasonable attorneys= fees and costs to the employee if the employee substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code ' 17.1-405.

SO DECIDED this March 8, 2011.

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

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

RE: DEDR CASE NO.: 9381

RULING ON REQUEST FOR RECONSIDERATION

Subsequent to my revised decision issued on March 8, 2011 counsel for the grievant requested a reconsideration of that decision. She asked that I reconsider my decision "specifically as to the termination, solely based on her LTD-Status, of the grievant." Upon consideration of the arguments raised in the letter dated March 18, 2011 requesting reconsideration, I decline to revise my decision further.

As I understand the ruling made by the Department of Human Resource Management (DHRM), the agency was justified by applicable policy in removing the grievant from employment when she transitioned from the status of LTD-Working to a LTD-Status. The grievant couches the separation from employment as a "termination" and points out the agency employee who testified at the hearing said that the agency never terminates an employee for being in LTD-Status. Whether what happened to the grievant was a termination or a mere transitioning into a status that allowed the agency to separate her from state employment may be a matter of mere semantics. In any event, DHRM ruled that the agency was acting consistently with policy in its action in removing the grievant from employment.

I do not agree with counsel that this is an instance of DHRM making its own findings of fact, an act which would be a usurpation of my authority. In making its ruling DHRM has taken the facts as found by me, applied them to the applicable policy, and reached a different conclusion. To the extent that the conclusion is not arbitrary, I must give it appropriate deference.

For these reasons, the Request for Reconsideration is denied.

SO ORDERED this 5th day of April, 2011.

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