

Issue: Separation from State (transitioned into LTD); Hearing Date: 10/31/16;
Decision Issued: 01/20/17; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10880; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10880

Hearing Date: October 31, 2016
Decision Issued: January 20, 2017

PROCEDURAL HISTORY

The Agency removed Grievant from employment because her status transitioned to Long-Term Disability.

On August 15, 2016, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On October 12, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 31, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether Grievant was removed from employment in accordance with State policy?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she seeks should be granted. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Transportation employed Grievant as an Engineering Technician III at one of its facilities.

The purpose of Grievant’s position was:

Apply engineering principles and practices to perform the daily maintenance and operation of the signal system communication network. Assist in the maintenance and operation of the freeway system communication network as required. Assist with transportation management and optimization as required. Functions as backup to the IMS Inventory Manager.¹

As back up to the IMS Inventory Manager, Grievant was expected to:

[Perform] all duties of the IMS Inventory Manager in his/her absence. On a District, Residence, and Area Headquarters wide basis, plans, develops, and monitors the IMS Inventory program to include adhering to purchasing requirements and meeting established IMS goals. Also, ensures appropriate segregation of duties, compliance to policies, procedures and meeting of established deadlines. Establishes, monitors, and adjusts stock levels based on need. Reviews reports for accuracy and authorized signatures. Responds to local audit findings and ensures proper resolutions to irregularities. Ensures designated backup personnel maintain adequate proficiency levels in performing IMS functions. Ensures that all inventory transactions such as emails, packing slips, scanned documents, etc. are accurate and submitted to the RBO timely.²

¹ Agency Exhibit 6.

² Agency Exhibit 6.

Grievant's position was required to "constantly" lift between 11 and 25 lbs.³

On July 10, 2013, Grievant received an email from the Deputy Maintenance Manager asking her to serve as backup IMS Inventory Manager and informing her of the duties of the backup manager.

On October 26, 2015, Grievant suffered an injury and subsequently went on Short-Term Disability status.

On November 24, 2015, the HR Analyst sent Grievant a letter stating:

VDOT has received notification that you have filed or intend to file a Short-Term Disability (STD) claim for income replacement purposes with [the Third Party Administrator] for the Virginia Sickness and Disability Program (VSDP). ***

You may not return to work with restrictions unless a transitional work assignment is approved. If your medical provider authorizes you to return to work full time, full duty, you must provide your supervisor with a full duty release. ***

Please be aware that the maximum period of STD is 125 work days. If you are unable to return to work at the conclusion of the maximum STD period, you may be eligible for LTD benefits payable from [the Third Party Administrator] or retirement benefits. When you transition to LTD, you will no longer be considered a VDOT employee and VDOT may fill your former position.⁴

On March 23, 2016, the HR Analyst sent Grievant a letter advising her that she was nearing the end of the 125 work days of Short-Term Disability coverage under the Virginia Sickness and Disability Program. Grievant was informed that if there was no change in her return to work status, she would transition to Long-Term Disability benefits on April 26, 2016. She was informed that once she transitioned to LTD, she would no longer be employed by the Agency.

Grievant returned to work on April 22, 2016 with a letter from her doctor placing restrictions on Grievant's ability to lift. She received updated restrictions from her doctor on April 28, 2016 limiting her to a lifting no more than 10 lbs. while using a brace. Grievant's work duties included sometimes lifting 36 inch and 48 inch metal signs that weighed over 10 lbs. She was unable to complete those duties with the restriction. The Agency decided to place Grievant on Long-Term Disability – Working status.

³ It is unclear whether the Agency correctly completed Grievant's EWP. The evidence, however, was uncontested that the essential job functions of Grievant's position included lifting between 11 and 25 lbs. seventy five percent of the time.

⁴ Agency Exhibit 3.

On June 23, 2016, Grievant and the Agency agreed to a Transitional Work Assignment effective April 22, 2016. The agreement provided:

By 7-21-16, it is VDOT's expectation that you will be functioning at full capacity. Your signature below signifies that you are aware of this goal and that this Transitional Work Assignment has been discussed with you.⁵

On July 1, 2016, Grievant's doctor wrote that Grievant was to continue with light duty restrictions "as tolerated."

Grievant asked the Agency to continue accommodating her by allowing her to work with restrictions for an additional two months.

On July 18, 2016, Grievant's Doctor wrote that Grievant is "unable to operate a forklift."⁶

The Agency reviewed Grievant's request for a two month extension of her Transitional Work Assignment and concluded an extension was not appropriate based on the Agency's needs. The Agency concluded there was no indication that Grievant would return to work full duty without lifting restrictions at the end of the two month extension.

On July 28, 2016, the Agency issued a letter to Grievant advising her that her:

approved Transitional Work Assignment (TWA) in Long Term Disability (LTD) – Working is anticipated to end on July 29, 2016. On July 30, 2016, you will transition to Long-Term Disability in a "not working" status. Please be aware that once you transition to LTD, you are no longer employed by VDOT. Your position becomes vacant and the agency may move forward with filling your position.⁷

Grievant met with the Benefits Administrator on July 29, 2016 who gave Grievant a letter separating her from employment.

CONCLUSIONS OF POLICY

Employees who transition into Long-Term Disability status are separated from State service. Grievant argued that the Agency should not have moved her into LTD status and that her employment should be restored.

⁵ Agency Exhibit 1.

⁶ Agency Exhibit 1.

⁷ Agency Exhibit 1.

The Virginia Sickness and Disability Program Policy 4.57 provides:

VSDP provides eligible employees with STD income for up to 125 workdays when the employee is unable to work due to an illness or injury that has been qualified by the TPA. STD benefits also cover medical absences due to pregnancy. ***

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. ***

LTD benefits, which include LTD-W and LTD (work-related and non-work-related), commence upon the expiration of the maximum period for which the employee is eligible to receive STD benefits. LTD benefits provide employees with income replacement if they become disabled and are unable to perform the full duties of the job without any restrictions. Return to employees' pre-disability positions are not guaranteed after beginning LTD and agencies can recruit and fill their predisability position. ***

LTD status is in effect when:

- Employee has received the maximum STD benefit and is unable to RTW;
- Employees are working any schedule outside their agency.
- Employees are unable to continue working 20 hours a week in LTD-W.

The following are the effects of LTD and conditions that must be met to receive the benefit.

- Employees in LTD are considered to be inactive employees of the Commonwealth. Return to pre-disability position is not guaranteed. Once in LTD, employees cannot return to LTDW.

Grievant entered Short Term Disability status. Instead of moving directly into LTD status, the Agency placed her on Long-Term Disability – Working status. The Agency's action was in accordance with policy.

The Agency has a Transitional Work Assignment Policy and Procedure to help enable recovery and the resumption of full duty by injured or ill employees whose injury or illness initially restricts their ability to perform normal job duties. This policy applies to employees on Long-Term Disability – Working status but not to employees on Long-Term Disability – Not Working or Conditional Leave Without Pay.

A Transitional Work Assignment (TWA) is:

A short-term assignment developed during recovery from illness or injury. A TWA must align with the temporary medical restrictions issued by the health care provider and be approved by the Return to Work Coordinator and the supervisor. The duration of this assignment is limited to 90-days or less. Individual TWAs may be extended on a case by case basis with Management and Human Resources approval based on agency need. The assignment can include tasks from the employee's current Employee Work Profile (modified) or other work assignments based on the work unit's business need and the employee's ability to perform. TWAs may be full-time, part-time or intermittent, based on agency need.⁸

The Agency complied with its Transition Work Assignment Policy and Procedure. The Agency had discretion to extend the TWA and elected not to do so for reasons related to its business operations.

Grievant argued she was able to perform her duties as she had done so over the past three years. Grievant did not present a doctor's note indicating she could work without lifting restrictions. She was not able to perform all of the essential job functions of her position.

The Agency's Accommodations for Persons with Disabilities Procedure sets forth the Agency's procedure to provide reasonable accommodation to the known physical or mental limitations of qualified employees. The policy defines Reasonable Accommodation as:

Any change in the work environment or in the way things are customarily done that results in equal employment opportunity for a person with a disability.

A Qualified Person with a Disability is defined as:

A person with a disability is qualified if (1) [he or she] satisfies the requisite skill, experience, education, and other job-related requirements of the position; and (2) [he or she] can perform the essential functions of the position, with or without reasonable accommodation.

An essential function of Grievant's position was the ability to lift between 11 and 25 lbs. Grievant was not able to perform that essential function with or without reasonable accommodation. Grievant was not a Qualified Person with a Disability requiring the Agency to accommodate her. The Agency is not required to accommodate an employee by removing an essential job function.

⁸ Agency Exhibit 2.

Grievant argued that the Agency could have extended the agreement for another two months to allow her to retire. The Agency had the discretion to extend the agreement and chose not to do so. The Agency did not fail to comply with policy by refusing to extend the agreement.

DECISION

For the reasons stated herein, Grievant's request for relief is **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 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-

calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. 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.⁹

[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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.