

Issue: Separation from State due to LTD; Hearing Date: 02/09/15; Decision Issued: 02/25/15; Agency: DSS; AHO: John R. Hooe, III, Esq.; Case No. 10507; Outcome: No Relief – Agency Upheld; **Administrative Review: DHRM Ruling Request received 03/13/15; DHRM Ruling issued 04/09/15; Outcome: AHO's decision affirmed.**

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

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of : Case No. 10507

Hearing Date: February 9, 2015
Decision Issued: February 25, 2015

PRELIMINARY MATTERS

Upon being appointed as the Hearing Officer in this matter, effective November 18, 2014, the Hearing Officer arranged a pre-hearing telephone conference which was conducted on December 1, 2014 at 9:00 a.m. The telephone pre-hearing conference was conducted with the Grievant and Agency representative. At that time, the grievance hearing was scheduled to be conducted on Monday, February 9, 2014 commencing at 9:30 a.m.

In accordance with the discussion during the telephone pre-hearing conference, the Hearing Officer mailed a letter notice of hearing dated December 4, 2014 to both parties. Later the Hearing Officer was advised that the Grievant would be represented at the hearing.

APPEARANCES

Grievant
Two Grievant Representatives
Grievant's Mother
Representative for Agency

ISSUES

1. Did Policy No.: 4.57 Virginia Sickness and Disability Program require that the Agency terminate grievant's employment upon approval of her Long Term Disability by Unum, the third party payor?

EXHIBITS

The Agency Exhibits admitted into evidence are contained in a single notebook with the following contents:

1. - Letter of separation dated September 29, 2014
2. - Grievance Form A
3. - Employee work profile
4. - Virginia Sickness and Disability Program Policy No. 4.57
5. - Virginia Sickness and Disability Program file records (32 pages)
6. - Time sheet and leave records (13 pages)

The Grievant Exhibit admitted into evidence:

Exhibit A - Leave balance/history/adjustment

WITNESSES

The Agency called B.M., Benefits Manager for the Agency.

The Grievant called D.M., Assoc. Director, Human Resources-Compliance for the Agency.

FINDINGS OF FACT

The Agency's exhibits, which are not in dispute, established that the Agency terminated the Grievant's employment effective September 29, 2014 for only one reason: Policy No. 4.57 Virginia Sickness and Disability Program required termination.

The letter of separation dated September 29, 2014 signed by D.M., Assoc. Director, Human Resources-Compliance and copied to P.F., Manager and B.S.M., Benefits Manager stated as follows "...Employees who move to LTD (long-term disability) cannot return to a LTD-W (long-term disability-working) status. The Virginia Department of Social Services does not hold positions for employees who transition into long-term disability.... This action is in accordance and compliance with Department of Human Resources Management (DHRM) Policy 4.57."

The Grievant, a long term employee of the Agency, qualified for short-term disability from December 2, 2013, through May 30, 2014, resulting in one hundred twenty-five work days of STD benefits. The Grievant returned to work on Friday, May 30, 2014 without restrictions (Agency Tab 5, Page 2). However on Monday, June 2, 2014 the Grievant returned to work with a prescription restricting her work to four hours per day and sedentary duties only (Agency Tab 5, page 3). The Grievant's status then changed to LTD-W (long term disability working).

By letter dated June 2, 2014 Unum advised the Grievant that her short-term disability benefits ended May 30, 2014 and that the process would begin to evaluate her eligibility for long-term disability benefits (Agency Tab 5, Pages 6-7). The Grievant's claim for long-term disability benefits was in pending status with Unum from May 31, 2014. By Unum letter dated September 25, 2014 (Agency Tab 5, Page 30) the Agency was advised that the Grievant's long-term disability benefits were approved through August 19, 2014 and that her claim was closed as of August 20, 2014 based on information "that supports she is able to perform all of the essential functions of her job."

The Grievant, in Grievant's Form A (Agency Tab 2) stated that during the period that she did not work the required twenty hours per week (LTD-W), the Grievant's time sheets and leave time were being submitted by HR and "I was unaware that leave was not being submitted to compensate the difference of the required 20 hours. The negligence of this action caused me to go from LTD (working) to LTD status. ...As of 08/19/2014, I separated from UNUM returning back to work full-time full duty 08/20/2014." B.M., Benefits Manager, testified that this automatically eliminated the Grievant's position and required the Grievant to reapply for employment. B.M. also testified that even if the Grievant had used accumulated leave time she still could not have saved her position once she transitioned to "LTD-not working."

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 (A) 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.

The Department of Human Resources Management Policies and Procedures Manual

sets out the Virginia Sickness and Disability Program as Policy No. 4.57 effective 1/1/1999 and last revised 11/25/13. The stated purpose of the program is as follows:

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 gain full employment when medically able. Provides employees with sick and family and personal leave (Agency Tab 4, Page 1).

The program further provides the details of a work status known as “long-term working disability benefit (LTD-W) as follows:

An income replacement benefit that commences upon the expiration of the maximum period for which the employee is eligible to receive STD (short-term disability) 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 twenty hours or more per workweek in his own position (Agency Tab 4, Page 4).

Policy No. 4.57 also sets out that an employee in LTD-W must continue to work twenty hours or more per week to maintain LTD-W status; that 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; and that employees who move to LTD cannot return to a LTD-W status (Agency Tab 4, Page 22).

Policy No. 4.57 states that LTD status (long-term disability) “is in effect when: employee has received the maximum STD benefit, is unable to return to work and is unable to continue working twenty hours a week in LTD-W. The policy further states that “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 LTD-W.” (Agency Tab 4, Page 24)

Finally, Policy No. 4.57 states that “Employees are separated in PMIS (PSE139) when they are released by their LTD to return to full-time/full-duty without restrictions and their pre-disability positions are no longer available.” (Agency Tab 4, Page 25)

While the Virginia Sickness and Disability Program (Policy No.: 4.57) does provide that an employee may use leave to supplement the difference in pay between the LTD-W disability benefit received and the employees pre-disability income (Grievant Tab 4, Page 23), the language of the program does not state that the use of leave will satisfy the condition of employment as LTD-W that the employee continue to work twenty hours or more per week.

Finally, Policy No. 4.57 requires that an employee “understand the program features of VSDP and his or her role and responsibilities of participating in the program...(and) carefully read the VSDP handbook...in order to understand benefits, personal responsibilities and

remedies.” (Greivant Tab 4, Page 32)

DECISION

The action of the Agency is upheld. While the Hearing Officer finds that application of Agency policy supports the Agency’s action, the Hearing Officer believes the ultimate outcome is unfair to the Grievant and is contrary to the stated purpose of the program.

APPEAL RIGHTS

A hearing decision must be consistent with law, policy, and the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings). A 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 administrative review by both EDR and the DHRM Director based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or email. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EDR and the Hearing Officer.

Important Note: Requests for administrative review must be in writing and received by the reviewer within fifteen calendar days of the date of the original hearing decision. “Received by” means delivered to, not merely post-marked or placed in the hands of a delivery service.

Requesting Administrative Review:

1. **A challenge that the hearing decision is inconsistent** with state or agency policy is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. The director’s authority is limited to ordering the Hearing Officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-371-7401 or emailed.
2. **A challenge that the hearing decision is not in compliance with the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings)**, as well as a request to present newly

discovered evidence, is made to EDR . This request must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance. EDR's authority is limited to ordering the Hearing Officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the office of Employment Dispute Resolution, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-786-0111 or emailed.

In response to any requests for administrative review, the opposing party may submit a written challenge (rebuttal) to the appropriate reviewer. If the opposing party chooses to submit a rebuttal, it must be received by the reviewer within ten calendar days of the conclusion of the original fifteen day appeal period. A copy of any such rebuttal must also be provided to the appealing party, EDR, and the Hearing Officer.

Administrative review decisions issued by the Director of DHRM and EDR are final and not appealable. If the DHRM Director or EDR orders the Hearing Officer to reconsider the hearing decision, the Hearing Officer must do so. If request for administrative review have been made to both the DHRM Director and EDR, the Hearing Officer need not reconsider his/her decision, if ordered to do so on remand, until both administrative reviews are issued or otherwise concluded unless otherwise directed by EDR in the interest of procedural efficiency. If requests for administrative review have been made to both the Director of DHRM and EDR, EDR shall generally respond first. Administrative reviews by the Director of DHRM should be issued within thirty calendar days of the conclusion of any other administrative reviews.

Final Hearing Decision. A Hearing Officer's original decision becomes a final hearing decision, with no further possibility of 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: Once an original hearing decision becomes final, either party may seek review by the Circuit Court on the ground that the final hearing decision is contradictory to law. Neither the Hearing Officer nor the Department of Human Resources Management (or any employee thereof) shall be named as a party in such an appeal.

An employee does not need EDR's approval before filing a notice of appeal. However, an agency must request and receive approval from EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal. The request for approval to appeal must be received by EDR within 10

calendar days, which means delivered to, not merely postmarked or placed in the hands of a delivery service. The agency may make its request by email or fax. The agency must provide a copy of its appeal request to the employee. EDR will provide a response within 10 calendar days of the agency's request.

A notice of appeal must be filed with the Clerk of the Circuit Court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR. The judicial review procedure shall be as more particularly set out in the Grievance Procedure Manual.

John R. Hooe, III
Hearing Officer