

Issue: Misapplication of policy (VSDP); Hearing Date: 03/06/15; Decision Issued: 03/27/15; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 10538; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 10538

Hearing Date: March 6, 2015
Decision Issued: March 27, 2015

PROCEDURAL HISTORY

EDR received Grievant's Grievance Form A on March 20, 2014 challenging his March 4, 2014 termination. As Grievant was terminated for alleged inmate abuse, EDR did not qualify this matter for hearing as, per §2.2-3007 of the Code of Virginia, such matters are to be heard by the Circuit Court. On request of Agency this matter was further addressed in EDR Ruling Number 2014-3843.

Grievant subsequently filed a hearing request with the Circuit Court who determined it did not have jurisdiction to hear the grievance and dismissed this case. The Circuit Court did not discuss the basis of its decision but EDR determined the Court ruling effectively overruled EDR's determination in Ruling No.2014-3843.

EDR expressed assumption the Circuit Court's dismissal was done "because the crux of the grievant's claims was the process of the determination, rather than the underlying disciplinary basis for the termination."¹

As provided in Compliance and Qualification Ruling No. 2015-4043, EDR granted Grievant's request to have a hearing on the limited issues raised in his grievance as to the process of his termination. EDR determined the hearing officer does not have authority to address the disciplinary basis for the termination and indicated Grievant had raised essentially three points on his Grievance Form A:

1. He could not be terminated while on short term disability.
2. His short-term disability benefits could not be terminated because he still qualified for them.
3. He has submitted a resignation letter to be effective at the end of his period of short term disability.
 - a. The resignation protected Grievant from being fired before the effective date of the resignation. and/or
 - b. He is seeking to have his departure from state employment re-characterized as a resignation rather than termination.

As discussed in Ruling No 2015-4043, EDR determined Grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy. EDR indicated, pursuant to Policy No. 4.57, (Virginia Sickness and Disability Program) employees' positions are held during periods of short-term disability however, if the situation warrants, Policy

¹ Compliance and Qualification Ruling, Ruling No. 2015-4043.

1.60 (*Standards of Conduct*) may be used while employees are on short term disability. In addition, Policy 4.57 further provides that short-term disability benefits end when the employee "leaves state employment, voluntarily or involuntarily". However, EDR further noted that Grievant asserted that contrary information was received from the third-party administrator ("TPA") of the short term disability ("STD") program for the Virginia Retirement System ("VRS") during the Grievant's period of short-term disability prior to his termination. Given VRS's (and its TPA's) role in the short term disability process, EDR found that this information presents a unique fact question as to whether and what extent the grievance rights and/or opportunities were impacted such that a hearing is warranted to address the matter. As such, the grievance was qualified for hearing on this limited basis to address questions on the grievance Form A about the process of the grievance termination. Per EDR's determination, Hearing Officer does not have authority to address the disciplinary basis for the termination.

Motion:

On joint motion of the parties made prior to the date set for hearing, and by the agreement and stipulation of counsel for each party:

- A set of agreed exhibits (consisting of Exhibits labeled A through J) was admitted in this proceeding.
- A set of agreed Stipulations (consisting of 15 written stipulations) was admitted in this proceeding.
- Grievant's Memorandum in Support of the Grievance and Agency's Memorandum in Opposition were filed in this proceeding.
- The personal appearance of the parties at hearing and conducting a hearing in person is waived and on joint motion:
 - a. No witnesses would be presented by either party.
 - b. The grievance hearing would be held via conference call and involving only the appearance, by telephone, of counsel for each party.
 - c. The hearing decision would be based upon arguments of counsel presented at conference call, agreed exhibits, agreed stipulations, and written memorandum of each party.

FINDING OF FACTS

The Hearing Officer finds, as Stipulated by the agreement of parties, the following 15 numbered facts (*the 15 stipulated facts are indicated below with redactions as to names*):

1. VDOC employed [**Grievant**] as a Correctional Officer at [**Prison**].
2. Grievant was placed on Pre-Disciplinary Suspension Leave on December 16, 2013, as a result of an incident with an inmate that occurred on December 15, 2013, and was under investigation. [See Exhibit A]
3. [**Grievant**] was also granted Short Term Disability Medical leave on the same date of December 16, 2014 by UNUM, the third party administrator of VDOC's employee disability benefits. [See Exhibit B]

(Hearing Officer notes a clerical error in the above date of December 16, 2014 which date should be December 16, 2013 as confirmed in Exhibit B.)

4. **[Grievant]** continued on Short-Term Disability and was under the care of a physician/psychiatrist/[Dr.____]. [See Exhibit C]

5. **[Grievant's]** counsel was informed by telephone conversation with UNUM that **[Grievant]** could not be terminated while he was on Short-Term Disability Leave as he was not an "active employee" and that he could only be terminated once he returned to work.

6. **[Prison]** sent **[Grievant]** letters requesting him to be interviewed as to the ongoing investigation against him. [See Exhibits D, D1 and D2}.

7. Counsel sent **[Prison]** a letter that **[Grievant]** was not an active employee and declined to be interviewed. In the same letter, **[Grievant]** further submitted his voluntary resignation from employment effective the date of the expiration of his Short-Term Disability Leave. [See Exhibit E]

8. On June 10, 2014, **[Grievant]** pled "no contest" and was convicted of misdemeanor assault and battery (of the inmate on the offense of December 15, 2013) by the **[Circuit Court, Case No. __]**. He did not appeal that conviction.

9. On March 4, 2014, while still on Short-Term Disability Leave, **[Grievant]** was given a Group III Written Notice for abuse of the inmate and was terminated from employment. [See Exhibit F]

10. Thereafter, **[Grievant]** received notice from UNUM that as a result of his termination, his Short-Term Disability was also terminated although he was still under a physician's care and had not been released or discharged from Short-Term Disability benefits. [See Exhibit G]

11. **[Grievant]** filed a Grievance by counsel that (1) he could not be terminated while on Short-Term Disability Leave, and (2) he could not be terminated because his voluntary resignation had already been submitted and would become effective at the end of his Short-Term Disability Leave. **[Grievant]** does not grieve the grounds of his termination, only the procedural aspects of whether his Short-Term Disability can be terminated prior to discharge by his physician and his voluntary resignation ignored [See Exhibit H]

12. The Office of Employee Dispute Resolution (hereinafter "EDR") "declined jurisdiction and advised **[Grievant]** that he may appeal directly to the circuit court [See Exhibit I]. The [EDR] ruling further stated that if the circuit court would not accept jurisdiction, EDR would re-open its file.

13. Subsequently, **[Grievant]** appealed to the Circuit Court of [__], but that court determined that it had no jurisdiction to hear the grievance and dismissed the case.

14. EDR reconsidered the matter after the Court's ruling. Upon reconsideration, EDR granted **[Grievant's]** request to have a hearing on the limited issues outlined in its letter Compliance and Qualification Ruling issued December 31, 2014 [See Exhibit J]

15. It is the position of the Virginia Department of Human Resources Management, as set forth in its periodical of January 2014, that "disciplinary action may take place even after an employee's STD claim has been approved and the employee has entered an STD leave from the workplace." [See Exhibit K]

ISSUES

BURDEN OF PROOF

Grievant has the burden, by a preponderance of the evidence. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.²

CONCLUSIONS

Grievant raises the issues of whether he could be terminated while on short term disability and whether his short-term disability benefits could be terminated because he still qualified for them not having been discharged by his physician. Furthermore, Grievant claims he submitted a resignation letter to be effective at the end of his period of short term disability, he could not be fired before the effective date of the resignation, and his departure from state employment should be as a resignation and not termination.

The Virginia Sickness and Disability Program, Policy Number 4.57, provides that Employees positions are held during periods of STD. However, if the situation warrants, Policy 1.60, Standards of Conduct may be used while employees are on STD.

Additionally, Policy 4.57 provides that STD benefits end when the employee leaves state employment, voluntary or involuntarily.

Policy No. 1.60, Standards of Conduct, § D.(2).(c.) provides:

- Employees who are suspended may not access their VSDP benefits during the period of suspension.
- Employees who are terminated for disciplinary reasons are not eligible to receive VSDP benefits.

Grievant has not alleged discrimination, retaliation, or discipline. EDR determined that Grievant's claims could only qualify for hearing based on the theory that the agency misapplied or unfairly applied policy.³

For an allegation of misapplication of policy or unfair application of policy to qualify for hearing, there must be facts that raises sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to those involving "adverse employment actions". Because Grievant's short-term disability benefits were discontinued and his employment terminated, there has been an adverse employment action in this matter.

Short Term Disability

While Grievant argues that he could not be terminated while on short-term disability and that his benefits could not be discontinued prior to discharge by his physician, Policy Number 4.57 provides that, if the situation warrants, Policy 1.60, Standards of Conduct, maybe use while

² Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

³ Compliance and Qualification Ruling, Ruling No. 2015-4043, December 31, 2014.

employees are on STD.⁴ Policy 4.57 also provides that short-term disability benefits end when the employee "leaves state employment, voluntarily or under voluntarily".⁵

Additionally, Policy 1.60 provides employees who are suspended may not access their VSDP benefits during the period of suspension and employees who are terminated for disciplinary reasons are not eligible to receive VSDP benefits.⁶

Grievant has asserted that UNUM, the Third Party Administrator of the STD program for the Virginia Retirement System, orally informed him during the time he was on STD prior to his termination he could not be terminated while on STD and his benefits could not be discontinued. This raises issues as to whether and what extent the grievant's rights and/or opportunities were impacted. Grievant also indicates that Grievant's counsel was informed by telephone conversations with UNUM that Grievant could not be terminated while he was on STD Leave as he was not an "active employee" and that he could only be terminated once he returned to work.⁷

However, no evidence addresses who was the individual providing this information, his/her title, position, or any other information concerning the person. While argument is presented as to these conversations there does not appear sufficient evidence raising "estoppel". Grievant's Memorandum also addresses receipt of information via telephone from a named Senior Disability Benefits Specialist with UNUM that once an employee was terminated, their STD benefits were retroactively terminated at the same time.⁸

Additionally, UNUM's letter to Grievant dated 3/6/14 indicated:

We have completed our review of your Short Term Disability claim and we are unable to approve your benefits beyond March 04, 2014.

We have confirmed with your employer that as of March 05, 2014 you have been terminated from your job. Based upon this information along with the below plan provision you are not eligible for benefits beyond March 4, 2014 in your file has been closed.

Program Provisions/Code of Virginia

The following Virginia code sections, program provisions are applicable to our claim decision.

Your plan provided by the Virginia Sickness and Disability Program states the following:

When a state employee is terminated, the VSDP benefits end. This is supported in the following Code of Virginia section as well as DHRM Policy 4.57 – When STD Benefits End. In the DHRM policy 4.57 it states "short-term disability benefits end when the employee leaves state employment, voluntarily or involuntarily."

Your claim decision was based on the Program Provisions/Code of Virginia. The Virginia sickness and Disability Program reserves its right to enforce other provisions of this program. . . .⁹

⁴ Policy 4.57 pg. 20.

⁵ Policy 4.57 pg. 21.

⁶ § D.(2).(c.) of Policy No. 1.60.

⁷ Stipulated Facts No. 5.

⁸ Grievant's Memorandum in Support of the Grievance.

⁹ Exhibit G.

DHRM's Agency Human Resources Services, AHRS Periodical (Vol 2, Issue 50 – January 2014) addressed Short-Term Disability and Disciplinary Actions. This article addressed policy in place and stated, "Disciplinary action may take place even if an employee's STD claim has been approved and the employee has entered an STD leave from the workplace."¹⁰ While this article was published subsequent to Grievant's discharge the article was not a publication of new policy but a set forth considerations as to policy in existence.

Grievant's termination while on short-term disability was based on matters involving an inmate for which he was subsequently convicted. His Written Notices with terminations were related to his actions involving or related to this incident.

Based upon the evidence in this cause Grievant has not met his burden. There is insufficient evidence to find that Grievant could not be terminated while on short-term disability or that his short-term disability benefits could not be terminated because he still qualified for them.

There has been an adverse employment action in this cause (STD benefits discontinued and termination). However, there is insufficient evidence to find Agency violated a mandatory policy provision, or Agency's actions in terminating Grievant while on short-term disability and discontinuance of benefits, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

Resignation

On February 5, 2014 Grievant submitted a resignation letter to be effective at the end of his period of short term disability. He contends that since he submitted this letter on a date prior to his being terminated his departure from state service is a voluntary resignation not an involuntary termination.

Timeline:

December 16, 2013 ... Agency letter of this date informed Grievant he was being placed on suspension effective December 16, 2013.¹¹

December 30, 2013... Letter of this date from UNUM notified Grievant Short-Term Disability benefits have been approved through January 21, 2014. Last day worked and disability date was determined to be 12/16/13.

January 21, 2014 ... Letter of this date providing Grievant formal due process notification.¹²

February 5, 2014 Letter from Counsel of this date provides:

2. Resignation Upon Completion of Term of Disability.

[Grievant] also states and endorses that he will resign upon medical grounds at the end of his Short-Term (or Long-Term) Disability Period as determined by the Benefits Administrator UNUM. [Dr.] has requested that UNUM grant an extension of the Short-Term Disability Period. As confirmed by UNUM, [Grievant] cannot

¹⁰ Exhibit K.

¹¹ Exhibit A.

¹² Exhibit D.

resign or be terminated while he is inactive on disability, so his resignation will therefore be effective immediately upon his release from disability leave. Authorized and submitted by [signed Grievant].¹³

- March 1, 2014... Written Notice issue date for Group III with Termination, Effective date of 3/4/14.
- March 3, 2014 ... Written Notice issue date for Group II with Termination Effective date of 3/4/14.
- March 3, 2014 ... Written Notice issue date for Group III with Termination Effective date of 3/4/14.
- March 4, 2014 ... On this date the above three Written Notices were signed by another employee next to the box marked "Employee refuses to Sign/Unavailable/ to sign."¹⁴
- March 6, 2014... Letter of this date from UNUM noted they had completed their review of Grievant's STD claim and were unable to approve Grievant's benefits beyond March 04, 2014 as, "you have been terminated from your job. Based on this information along with the below plan provision you are not eligible for benefits beyond March 04, 2014 and your file has been closed."¹⁵

On 2/5/14 Grievant submitted signed a statement entitled "Resignation Upon Completion of Term of Disability" and stating he will resign upon medical grounds at the end of his short-term (or long-term) disability period as determined by the Benefits Administrator UNUM. At issue is whether this statement prohibits Agency from terminating Grievant. Grievant contends that as per the decision in Case No. 8538 Grievant acted first and therefore, the separation from employment must be recorded as a resignation.

The Hearing Officer's Decision in Case No 8538 is raised in support of Grievant's position. This case addresses severability of the employment relationship for which there is no contractual length of service. In this case, the hearing officer found the grievant acted unilaterally to sever the employment relationship on a date prior to her termination. A DHRM Policy Ruling (dated May 18, 2007) addressed the Hearing Officer's decision in Case No. 8538 and noted "it is clear the grievant submitted her resignation before the agency issued to her the Group III Written Notice with removal. Therefore, it is logical that, for the record, the grievant's separation should be recorded as a resignation... ."

It is clear that in the above cited case the grievant clearly resigned from employment and did so at a time certain prior to her termination. However, in the present case, as opposed to an immediate resignation statement, Grievant stated an intention to resign and further indicated that his resignation would be effective either at the end of either his short-term disability or at the end of his long term disability. Either date being an indeterminate date sometime in the future. Also Grievant imposes the condition that requires the "Benefits Administrator UNUM" determine the end of STD or LTD.

It appears that Grievant is also contending that his resignation predated Agency's termination due to UNUM's 3/6/14 letter providing for a retroactive termination of benefits beyond

¹³ Exhibit E.

¹⁴ Exhibit F.

¹⁵ Exhibit G.

March 4, 2014 and argues that, due to this retroactive termination of benefits, his resignation was absolute and final on 3/4/14 while the 3 Written Notices with Termination were not final until a 30 day appeal period expired after their being issued.

The evidence indicates Grievant has not provided a resignation to Agency prior to his being termination by Agency. The evidence indicates that his termination gave rise to the letter of March 6, 2014 and UNUM's determination that they were unable to approve Grievant's benefits beyond March 04, 2014 **as he had been terminated from his job**. Grievant was notified that, based on this information along with the below plan provision, he was not eligible for benefits beyond March 04, 2014 and his file has been closed. The letter further indicated:¹⁶

Your plan provided by the Virginia Sickness and Disability Program states the following:

When a state employee is terminated, the VSDP benefits End. This is supported in the following Code of Virginia section as well as DHRM Policy 4.57 – When STD Benefits end. In the DHRM policy 4.57 it states "short-term disability benefits end when the employee leaves state employment, voluntarily or involuntarily."

DECISION

For the reasons stated above, based upon consideration of all the evidence presented in this cause, the Hearing Officer finds that Grievant was terminated by Agency, his resignation does not precede the effective date of Agency's termination, and UNUM's subsequent termination of disability benefits does not act to make Grievant's resignation predate his termination.

There is insufficient evidence to find Agency misapplied or unfairly applied policy. While there was an adverse employment action in that Grievant was terminated and his STD benefits discontinued, there is insufficient evidence to find Agency violated mandatory policy provisions, or the termination, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

Based upon the evidence in this cause there is insufficient evidence to find that Grievant could not be terminated while on short-term disability or that his short-term disability benefits could not be terminated because he still qualified for them.

There has been an adverse employment action in this cause (STD benefits discontinued and termination). However, there is insufficient evidence to find Agency violated a mandatory policy provision, or Agency's actions in terminating Grievant while on short-term disability and discontinuance of benefits, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual (effective date: July 1, 2012)* 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.

¹⁶ Exhibit G.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM. This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. 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 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("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 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

B. Final Hearing Decisions:

A hearing officer's 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.

C. 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. 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.

S/Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

copies e-mailed to: Grievant's attorney
Agency Attorney
EDR