



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11489

Hearing Date: May 15, 2020
Decision Issued: August 12, 2020

PROCEDURAL HISTORY

The Agency separated Grievant from employment. On October 31, 2019, Grievant timely filed a grievance to challenge the Agency's action. The Office of Employment Dispute Resolution issued Ruling 2020-5011 qualifying the grievance for hearing.¹ On January 27, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 15, 2020, a hearing was held by audio conference due to the COVID19 pandemic.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether the Agency separated Grievant from employment in accordance with State policy?
2. Whether the Agency discriminated against Grievant based on her disability?

¹ Much of the analysis for this grievance was stated in the Ruling and included herein.

BURDEN OF PROOF

The burden of proof is on 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 Department of Behavioral Health and Developmental Services employed Grievant as a Direct Service Associate III/Staffing Scheduler at one of its facilities. She began working for the Agency on October 10, 2017.

The Facility had a “huge vacancy rate” for nursing positions. The Agency needed to ensure that patients were being observed at all times even if a nurse was not able to be on a floor with patients.

Accountability duties meant non-clinical staff were to assist while medical professionals helped patients. It involved dealing with activities of daily living and monitoring patients so that nursing staff could provide patient care. Some of the Agency’s patients needed to be “watched around the clock.” If nursing staff were attending to other patients, the Agency expected Staffing Schedulers to perform accountability duties until nursing staff could resume those duties. In other words, Staffing Schedulers would serve as “personal care sitters” who would monitor patients as needed to ease demands on medical staff’s time.

The Agency created Accountability duties as a “stop gap” for the Agency’s shortage of nurses.

Grievant was placed on approved short-term disability from February 26, 2019 to August 19, 2019.

Grievant was one of nine employees holding DSA III/Staffing Scheduler positions. In May 2019, while Grievant was still on leave, the Agency adjusted the responsibilities for Staffing Schedulers to incorporate a category of duties classified as “Accountability.” The Agency’s decision to add accountability duties related solely to its business needs for patient care.

Before Grievant’s STD leave, the Agency permitted, but did not require, Staffing Schedulers to perform Accountability tasks. Grievant had declined to take on these tasks due to a physical medical condition, which had unpredictable symptoms that could

interrupt patient monitoring. In other words, Grievant feared being unable to complete her assignment if her impairment required her to leave the area where she was monitoring a patient.

Grievant returned to work in June 2019. Shortly thereafter, her supervisor ordered her to complete Accountability training. When Grievant reminded her supervisor of her medical restrictions for Accountability tasks, the supervisor referred her to the Agency's human resources staff, who sent Grievant home pending medical documentation of her restrictions for Accountability tasks. As of June 17, 2019, Grievant began another period of short-term disability leave due to a relapse of her mental health condition.

After exhausting her STD benefits, Grievant returned to work on August 19, 2019. Grievant submitted a medical release dated August 13, 2019 indicating she could return to work on August 19, 2020 with the restriction to do "desk duty only." Grievant produced another doctor's note stating: "I recommend [Grievant] to return to work for desk duty with following restriction. To avoid prolong walking, climbing or lifting. Avoid direct patient care."²

Grievant received paid administrative leave from August 20, 2019 to August 22, 2019 while the Agency attempted to find another position for her.

The Agency identified and offered to Grievant a temporary assignment in its IT department. Grievant accepted the position and the Agency placed Grievant in Long Term Disability-Working status effective August 23, 2019.

On August 29, 2019, human resources staff at Agency's central office explained that the new assignment would be in effect "until we gather more medical information from your doctor or until it is no longer a business need." However, on September 18, 2019, Agency staff advised Grievant by letter that "[t]ransitional duty is only for thirty (30) calendar days," although the Agency was extending this period for nine additional days to conclude on September 30, 2019. The letter further advised: "If you are unable to return to work full-time/full-duty and perform the essential functions of your Employee Work Profile as a Direct Service Associate III/Staffing Scheduler by October 1, 2019, you will be separated from your position and transition into long-term disability"³

On October 1, 2019, Grievant produced a medical excuse from work for September 30 to October 7 "with continued work restrictions."⁴ On October 3, 2019, the Agency advised Grievant by letter that her "long-term disability – working (LTD-working) benefit period ended on September 30, 2019. . . . Therefore, your position will not be

² Agency Exhibit D.

³ Agency Exhibit H.

⁴ Agency Exhibit D.

held for you and your active employment with the Commonwealth of Virginia will cease at the conclusion of your long-term disability – working period.”

The Third Party Administrator sent Grievant three packages at different times to complete in order to obtain LTD benefits. Grievant did not complete those packages. Her LTD ended.

CONCLUSIONS OF POLICY

DHRM Policy 4.57 governs the Virginia Sickness and Disability Program. This policy governs how employees on short term disability transition to long term disability. Under this policy:

Short Term Disability is:

[A benefit that c]ommences upon the expiration of a 7 calendar day waiting period, and provides replacement income for a maximum of 125 work days at 100%, 80% or 60% for defined periods of time based on an employee’s date of hire, or re-hire, and total months of state service. If the disability/illness is deemed catastrophic, the employee would receive 100% or 80% income replacement and the waiting period would be waived.

STD benefits end when the employee:

- is able to perform the essential functions of his or her predisability job on a full-time basis.
- begins receiving LTD benefits.
- begins receiving a VRS service retirement benefit.
- fails to cooperate or comply with the requirements of the VSDP.
- takes a refund of VRS contributions and interest.
- leaves state employment, voluntarily or involuntarily.
- dies.

Long Term Disability is:

An income replacement benefit that commences upon the expiration of the maximum period for which the employee is eligible to receive STD benefits, and provides income replacement in an amount equal to 60% of participating employee’s creditable compensation or 80% income replacement if the disability has been designated catastrophic.

Long Term Disability – Working is:

An income replacement benefit that commences upon the expiration of the maximum period for which the employee is eligible to receive STD

benefits, and allows employees to continue to work for their agencies from STD working status into LTD-W. In LTD-W the employee must work at least 20 hours or more per workweek in his own position. Qualified part-time employees continue to work for their agency when moving from STD into LTD-W for 20 or more hours per week.

Return to work program is:

Assignment of employees to their pre-disability position or alternative assignments for a specified length of time with job modifications in an attempt to assist them in returning to full duty employment.

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-Working status is in effect when:

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

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

- Employees must continue to work 20 hours or more per week to maintain LTD-W status.
 - LTD-W is intended to be a short-term transitional work situation where the employee is working towards full return to work with no restrictions.
- Note: Employees who move to LTD cannot return to a LTD-W status.

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.

Note: Employees must continue to be medically approved for LTD benefits.

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.
- Employees must apply for social security disability income benefits immediately upon going into LTD unless otherwise instructed by the TPA. Within 60 days of being placed in LTD, the TPA must receive notification that application for Social Security Disability Insurance Benefits (SSDIB) has been made or VSDP benefits will be terminated.

A central question in this case is whether Accountability was an essential function of Grievant's position. Under DHRM Policy 4.57, an essential job function is:

The required job duties that must be performed in order to produce the expected outcome.

Under case law, a job function may be "essential" when:

the reason the position exists is to perform that function, when there aren't enough employees available to perform the function, or when the function is so specialized that someone is hired specifically because of his or her expertise in performing that function. If an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. Other relevant evidence can include the employer's judgment as to which functions are essential, the amount of time spent on the job performing the function, the consequences of not requiring the incumbent to perform the function, and the work experience of people who hold the same or similar job.⁵

The Agency was authorized to add accountability duties to the position of DSA III/Staffing Scheduler because it did so pursuant to its business needs. The Agency was authorized to assign Accountability duties which involved patient monitoring to a DSA III position because that position included direct care to patients. The Agency's decision to

⁵ Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 579-80 (4th Cir. 2015) (citing 42 U.S.C. § 12111(8); 29 C.F.R. §§ 1630.2(n)(2), 1630.2(n)(3)) (internal quotation marks omitted) (finding that "providing customer service" was not necessarily one of a court clerk's essential job duties, even though it was listed in her job description); see 29 C.F.R. app. § 1630.2(n) ("The inquiry into whether a particular function is essential . . . focuses on whether the employer actually requires employees in the position to perform the functions" that are considered essential).

require employees in Grievant's position to perform Accountability duties was unrelated to Grievant or her disability.

Accountability is an essential function of Grievant's position as a DSA III/Staffing Scheduler. The Agency's primary function is to provide care and treatment for its patients. It is essential to the Agency that its patients be monitored closely and continuously. If a patient is unmonitored and the patient harms himself or others or experiences an emergency medical condition, the Agency would be responsible for failing to provide adequate services and treatment of its patients. The Agency operates with limited staff due to fiscal considerations. The Agency established the need for Staffing Schedulers to assume accountability duties in order to provide complete care for its patients. If the Agency allowed Grievant to work as a Staffing Scheduler and she was unable to perform accountability duties, she would place the Agency's patients at risk of harm and, thus, expose the Agency to unnecessary liability. If the Agency needed Grievant to perform accountability duties for up to three hours per month and she was unable to do so, the Agency's patients could suffer. Even a momentary absence from patient observation could have significant consequences to a patient. If Grievant were to begin performing accountability duties and then have to stop due to a medical condition, there is no reason for the Hearing Officer to believe other Agency nursing staff would be able to stop their patient treatment and begin performing Grievant's accountability duties.

Grievant alleged the Agency discriminated against her based on her disability of "severe mental health distress." The Agency did not dispute that Grievant had a disability. Grievant asserted the Agency failed to reasonably accommodate Grievant's medical condition and otherwise took adverse actions against her because of an actual or perceived impairment, in violation of the Americans with Disabilities Act ("ADA").

DHRM Policy 2.05, *Equal Employment Opportunity*, "[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or *disability*. . ." Under this policy, "'disability' is defined in accordance with the [ADA]", the relevant law governing disability accommodations.⁶ Like Policy 2.05, the ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.⁷ A qualified individual is defined as a person who, "with or without reasonable accommodation," can perform the essential functions of the job.⁸

⁶ *Id.*; see 42 U.S.C. §§ 12101 through 12213. A disability may refer to "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment" 42 U.S.C. § 12102(1).

⁷ 42 U.S.C. § 12112(a).

⁸ *Id.* § 12111(8); 29 C.F.R. § 1630.2(m).

Grievant asserts she is a qualified individual with a disability who can perform her work duties with a reasonable accommodation. Grievant seeks as an accommodation for the Agency to excuse her from performing accountability duties. She does not want to be expected to engage in “long walking”, “walking back and forth on the floor”, and “no climbing or lifting.”

Grievant did not produce a medical excuse indicating that she could return to work as a DSA III/Staffing Scheduler without restrictions. Grievant was unable to perform Accountability duties. Thus, Grievant was not able to perform an essential function of her position.

If Grievant’s request for accommodation were granted, she would not be performing the essential functions of her position. Because the addition of the accommodation she seeks would not allow her to perform the essential functions of her position, she was not a qualified individual under the ADA. Thus, the Agency did not discriminate against Grievant because of her disability.

The Agency considered whether a reasonable accommodation existed for Grievant and concluded it was not possible to allow her to remain a Staffing Scheduler who did not perform accountability duties. The Agency’s conclusion is supported by the evidence. If Grievant were to remain a Staffing Scheduler without accountability duties, the Agency would have to prevent its nursing staff from rendering services in parts of the facility when and where they were needed or it would have to hire another employee to perform the accountability duties. The amount of time Grievant would be expected to perform accountability duties could be up to three hours per month.

Grievant did not identify another available position at the Facility suitable for her to work without restriction.

The Agency complied with policies governing STD and LTD. Grievant entered STD. When her STD benefits ended, the Agency attempted to retain Grievant as an employee by placing her on LTD-Working. LTD-Working is a short term transitional status intended to allow an employee to work to return to full status as an employee without restriction. It became clear to the Agency that Grievant could not return to her former position without restriction. After the Agency determined it could not keep Grievant on LTD-Working, it transitioned her to LTD.

LTD benefits end on the earliest of the following:

- During the first 24 months of disability, if the employee is able to perform the full duties of his pre-disability position on a full time basis without any restrictions.
- After 24 months of disability, if the employee is able to perform the full duties of any job for which he is reasonably qualified, based on his training and experience, on a full-time basis without any restrictions and is earning 80% or more of his pre-disability income.

- A refund of VRS contributions and interest;
- Failure to cooperate or comply with the requirements of VSDP;
- Receipt of a VRS service retirement benefit; or
- Death.

Grievant's LTD ended because she failed to complete an application for LTD with the Third Party Administrator. Thus, Grievant failed to cooperate or comply with the requirements of VSDP. The Agency appropriately ended her LTD.

DECISION

For the reasons stated herein, the Grievant's request for relief is **denied**.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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