JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2023-5493
March 3, 2023

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) on whether his September 23, 2022 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is qualified for a hearing.

FACTS

In October 2021, the grievant began a period of short-term disability leave to receive treatment for cancer. On April 14, 2022, he returned to work full-time following the exhaustion of his short-term disability period under DHRM Policy 4.57, *Virginia Sickness and Disability Program*. Although it appears he returned to work without restrictions, the grievant continued to receive medical management of his cancer diagnosis and took occasional days off for related diagnostic appointments. On July 5, 2022, the grievant filed a new short-term disability claim to undergo additional cancer treatment. On or about August 29, 2022, the state's third-party benefits administrator apparently denied the grievant's claim on grounds that it was a continuation of his previous claim, for which the leave benefits had exhausted, and because he did not work 45 consecutive work days after returning to work to meet the requirement for a new claim. Accordingly, the grievant was transitioned to long-term disability status, and the agency separated him from employment.[1]

On or about September 23, 2022, the grievant initiated a grievance challenging the agency's administration of his disability benefits after he returned to work in April 2022, leading to his involuntary separation from employment. Primarily, the grievant argues that, based on information he received from staff at both his facility's human resources department and the insurer, he should have been eligible for a new short-term disability claim because he had worked for more than 45 calendar days following his return to work, as required for a new claim for the same condition as a prior claim.[2] According to the benefits administrator, the 45-calendar-day period restarted each time the grievant was absent for medical appointments related to his illness.

[1] The record suggests that the agency may have separated the grievant's employment retroactive to July 5, 2022, the day he initiated a new disability claim.
[2] *See* DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 18.

However, the grievant maintains that absences for follow-up care should not restart the 45-calendar-day period because his work absences were due to travel time[3] and not illness. Second, he claims that the benefits administrator made no determination as to his claim for almost two months, and when the determination was made, the agency made a seemingly immediate decision to terminate his employment and benefits retroactively. As a result, he claims, he was unable to receive needed treatment due to the unexpected interruption in his health insurance coverage. Finally, the grievant claims that the benefits administrator informed him that he had no appeal rights as to the denial of his claim for a new short-term disability period. The agency has maintained that it coordinated the grievant's benefits in accordance with applicable policies and also restored his health benefits to the extent he is eligible for them in long-term disability status. The agency head declined to qualify the grievance for a hearing, and the grievant has appealed that determination to EDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[4] Generally, the grievance procedure limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] An adverse employment action is defined as a "tangible employment action" constituting "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7] Because the grievant in this case was involuntarily separated from employment, the grievance sufficiently alleges that he experienced an adverse employment action.

In addition, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[8] Thus, claims relating solely to the "[h]iring, promotion, transfer, assignment, and retention of employees" generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state or agency policy may have been misapplied or unfairly applied.[9] Here, the grievant appears to allege that the agency misapplied and/or unfairly applied state policies by misleading the grievant about his eligibility for disability benefits and then retroactively terminating his employment when the insurer denied his benefits claim. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must raise a sufficient question as to whether management violated a mandatory policy provision, or whether

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[3] The grievant has asserted that, given his home and work location in western Virginia, the nearest care facility for his condition required him to travel four hours one-way for oncology care. As such, he missed full days of work due to the need to travel, not because he was too disabled to work.
[4] *See Grievance Procedure Manual* § 4.1.
[5] *See id.* § 4.1(b).
[6] Ray v. Int'l Paper Co., 909 F.3d 661, 667 (4th Cir. 2018) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).
[7] Laird v. Fairfax County, 978 F.3d 887, 893 (4th Cir. 2020) (citing Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007)) (an adverse employment action requires more than a change that the employee finds "less appealing").
[8] *See* Va. Code § 2.2-3004(B).
[9] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

the challenged action in its totality was so unfair as to amount to a disregard of the applicable policy's intent.

Virginia Sickness and Disability Program

In this case, the grievant argues that the agency misapplied or unfairly applied DHRM Policy 4.57, *Virginia Sickness and Disability Program*. Under Policy 4.57, short-term disability (STD) benefits end when an employee "is able to perform the essential functions of his or her pre-disability job on a full-time basis."[10] If an employee exhausts their short-term disability benefits and cannot return to work, long-term disability (LTD) benefits may commence.[11] LTD benefits may take the form of LTD-Working status, such that state employment continues and the employee works at least 20 hours per week, or LTD status, when active state employment effectively ends.[12]

As described by Policy 4.57, a third-party private company acts as the benefits administrator for the Virginia Sickness and Disability Program (VSDP) and is responsible for "administer[ing] the daily operation" of VSDP.[13] Under Policy 4.57, agencies are responsible for "[c]oordinat[ing] disability claim[s] and benefits with the [third-party administrator], employee, and employee's supervisor."[14] Employees are responsible for "[u]nderstand[ing] the program features of VSDP," including "[c]arefully read[ing] the VSDP handbook . . . in order to understand benefits, personal responsibilities and remedies."[15]

As it relates to this case, Policy 4.57 addresses circumstances in which an employee claims successive periods of STD for the same condition, as follows:

> Employees released to return to their pre-disability positions on a full-duty basis who again become disabled due to the same condition will be considered to be in a continuation of the prior disability if . . . [t]he employee works fewer than 45 consecutive calendar days (defined as scheduled work days and rest days, e.g., weekends) and the absence is related to the same major chronic or non-major chronic condition[.] . . . Approved absences due to leaves for other reasons, e.g., [sick leave under Policy 4.57], annual leave, etc., have no effect in the counting of the 45 . . . consecutive calendar days. Days worked or on leave do not count towards the transition into LTD. . . .
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> A new period of STD begins when employees . . . [r]eturn to work full-time/full duty for 45 or more consecutive calendar days after a major chronic or non-chronic condition, but cannot continue to work[.][16]

The *VSDP Handbook*, published by the Virginia Retirement System, provides additional detail on how to count the 45 consecutive calendar days. According to the *Handbook*, an employee "will be considered on the same short-term disability claim if [they] are released to return to work

[10] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 21.
[11] *Id.*
[12] *Id.* at 22, 24.
[13] *Id.* at 6.
[14] *Id.* at 31.
[15] *Id.* at 32.
[16] *Id.* at 17-18; *see* Va. Code § 51.1-1111.

full time, full duty . . . and go out again for the same or a similar condition within 45 consecutive calendar-days of [their] return to work."[17] On the other hand, an employee must file a new STD claim if they are "released to return to work full time, full duty . . . and go out again for the same or a similar condition on the 45th calendar day or after [their] return to work. . . . Full-day absences from work during the first 45-day period could affect whether [the employee is] considered to be on the same claim or need[s] to file a new claim."[18]

For employees who are disabled and "unable to perform the full duties of the job without any restrictions," LTD benefits commence "upon the expiration of the maximum period for which the employee is eligible" for STD benefits.[19] Policy 4.57 also provides that "[e]mployees have access to an Appeals Process for VSDP claims."[20] Likewise, the *VSDP Handbook* specifies that, for denied appeals, the letter of denial "will include information on the appeal process."[21]

Coordination of Benefits

The grievant contends that the agency failed to effectively coordinate his disability benefits with him and the benefits administrator, as required by Policy 4.57. Specifically, the grievant argues that he was in frequent contact with his facility's human resources staff and with a claims agent for the benefits administrator after he returned to work on April 14, 2022. During this time, he apparently sought to understand his eligibility for a successive STD claim in the case of future needs as he continued to manage his cancer diagnosis. According to the grievant, his facility's human resources staff indicated that the 45-calendar-day period would include personal days and medical appointments; *i.e.* those absences would *not* restart the period of consecutive calendar days needed to be eligible for a new STD claim. The grievant claims that his case manager for the benefits administrator confirmed this information.

Between April 14 and on or about July 4, 2022, the grievant was on approved absences from work on April 27, April 28, May 25, June 8, and June 9, 2022. The grievant specifically claims that he inquired whether these absences would affect his STD eligibility; he was allegedly told they would not, including the absences that were personal days. On April 27, May 25, and June 8, the grievant attended cancer-related medical appointments while he was on leave. It appears that the benefits administrator learned of these appointments from the grievant's medical provider and therefore determined that the absences must restart the 45-calendar-day period. As a result, the benefits administrator ultimately denied the grievant's July 5 STD claim on grounds that it was a continuation of his previous claim, whose benefits had exhausted.

Disputing the grievant's account, the agency maintains that its staff informed the grievant of the potential consequences for missing days of work. His facility's human resources officer claimed that she "told him . . . personally on more than one occasion" that "he had to work 45 days and that full days missed for Dr. appointments would reset it." However, the record raises some inconsistency as to this issue, as the same human resources officer emailed the benefits

[17] Virginia Retirement System, *Virginia Sickness and Disability Handbook* (July 2022), at 23, available at www.varetire.org/pdf/publications/vsdp-handbook.pdf.
[18] *Id.* at 24.
[19] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 21.
[20] *Id.* at 34.
[21] *VSDP Handbook* at 13.

administrator on August 25, 2022, objecting to denial of the grievant's claim and citing DHRM Policy 4.57:

> My employee just called and said he was not getting a new claim due to missing 5 work days between his last claim and the new claim. He should be getting a new claim!!!

The same human resources officer sent a subsequent message explaining that, although the grievant had missed full days of work for medical appointments, the reason was not because he was too disabled or ill to work but rather because his location in a remote part of the state meant that he had to drive several hours round-trip for appointments with his treating physicians.

Based on the totality of the allegations, EDR concludes that the record raises a sufficient question whether the grievant received adequate coordination of his benefits under Policy 4.57. Under that policy, the grievant should have been eligible for a new STD period if he worked full-time, full-duty for 45 or more consecutive calendar days after returning from his previous STD leave. Seeking to understand how to use that benefit properly, the grievant allegedly initiated discussions with his human resources staff and with his benefits case manager as to how the 45 calendar days would be counted. Specifically, the grievant was concerned with whether attending doctor appointments on work days would restart the 45-calendar-day period.

EDR observes that neither Policy 4.57 nor the *VSDP Handbook* offers a direct answer to that question. The applicable provisions of Policy 4.57 explain as follows:

> Approved absences due to leaves for [reasons other than a relapse of disability] have no effect in the counting of the 45 . . . consecutive calendar days. Days worked or on leave do not count towards the transition into LTD. . . .
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> A new period of STD begins when employees . . . [r]eturn to work full-time/full duty for 45 or more consecutive calendar days after a major chronic or non-chronic condition, but cannot continue to work[.][22]

It appears that the agency and benefits administrator interpreted "consecutive calendar days" in these provisions to mean consecutive days on which the employee does not use a full day of leave to receive disability-related medical care. However, this interpretation is not necessarily consistent with the provision that "[d]ays worked or on leave do not count towards the transition to LTD." Moreover, Policy 4.57 provides elsewhere that "[a]bsences for doctor, physical therapy, or other medical appointments are not covered by VSDP. Employees must use accrued leave to cover the absence."[23] None of these provisions suggest that an employee's approved use of accrued and/or discretionary leave to attend non-emergent medical appointments with specialists should disrupt the counting of consecutive days required to begin a new period of STD.

Even if Policy 4.57 contemplated that absences for certain medical care would restart the count of consecutive days worked, the *VSDP Handbook* provides no guidance for employees or

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[22] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 18.
[23] *Id.* at 19. Although this provision appears in the policy section related to intermittent disability leave, nothing in the policy suggests that medical appointments *would* be covered by VSDP under other circumstances.

agency staff as to when care may rise to this level. Although the *Handbook* does generally advise that full-day absences can restart the count, it gives no detail as to the criteria for identifying such absences and simply refers employees back to their human resources staff for more details.[24] In this case, it appears that the benefits administrator deemed the appointments to be "ongoing treatment for an ongoing disability." However, although there is no dispute that the grievant was managing a catastrophic disability by attending medical appointments on days that he drew down Annual and Family/Personal Leave, the record does not suggest that his condition made him unable to work on those days. There is additionally no indication that the grievant's full-time, full-duty release to return to work was ever changed until he claimed a subsequent STD period as of July 5.

EDR recognizes that the 45-calendar-day period described by Policy 4.57 would likely *not* include absences that appear to be essentially a continuation of exhausted disability leave, even if not classified as such. For example, an employee with a long-term illness could exhaust their 125 workdays of STD leave under the policy, officially return to work full-time, but then liberally draw down accrued leave balances on days they continue to be too disabled or ill to perform the essential functions of their job. In that scenario, the use of accrued leave to effectively extend an exhausted STD period could potentially disrupt the 45-calendar-day count to be eligible for a new claim.

By contrast, in the present case, the grievant apparently missed three sporadic days of work over two months to receive scheduled outpatient medical diagnostic care – not because his disability made him unable to work on those days, but because those were days on which his preferred medical providers were available. Even if related to the condition for which he had recently exhausted an STD claim, we identify no basis in policy or the *VSDP Handbook* to conclude that these absences, claimed as Family/Personal leave, should restart the count of consecutive calendar days for the grievant's STD eligibility. According to the grievant, he opted to schedule his ongoing diagnostic care during this time through the same medical system that had been providing his previous medical care, even though it required several hours of travel on workdays, because he was assured that this purpose for using his accrued leave would not affect his STD eligibility. The grievant claims that, if he had known otherwise, he would have scheduled his appointments differently.

EDR concludes that, regardless of what the grievant was actually told, he was entitled to understand through reasonable effort how absences for pre-scheduled medical appointments would affect his STD eligibility under Policy 4.57. Because the record is mixed at best as to whether accurate information on that point was available to him, there is a sufficient question whether the agency's coordination of his benefits with the benefits administrator satisfied policy requirements.

Moreover, the available evidence suggests that denial of the grievant's benefits by the benefits administrator may not have been consistent with Policy 4.57. A representative of the administrator explained to the agency's human resources officer that "the disability plan does require that absences during the 45 day period reset the relapse period. Since these visit/treatments were needed during the return to work period this would be considered ongoing treatment for an ongoing disability." As stated above, EDR has not been able to identify any basis for this reasoning

[24] Referring employee questions to their human resources representatives, and/or DHRM staff, would appear to be consistent with Virginia Code section 51.1-1101, which requires the development and administration of a disability benefits plan but expressly does "not intend[] to abrogate the final authority of the Director of the Department of Human Resource Management . . . to establish and interpret personnel policy and procedures . . . ."

in law or policy.[25] In addition, the grievant has raised concerning allegations that the benefits administrator informed him upon his transition to long-term disability that there was "nothing to appeal," even though Policy 4.57 provides for an appeals process for benefits determinations.[26] To the extent that the grievant's benefits were not administered correctly, his consequent separation from employment resulted from a misapplication or unfair application of policy that qualifies for a hearing.

Transition to LTD/Separation

The grievant additionally claims that his transition to LTD proceeded in contravention of policy because the agency wrongly assumed that denial of his STD claim meant he should be immediately separated from employment. According to the grievant, the agency contacted him within minutes of receiving the determination of his claim and informed him that he was no longer a state employee and that his health benefits would be retroactively canceled.

In light of the previous section's analysis, EDR concludes that this claim presents a separate issue that qualifies for a hearing, as the record presents a sufficient question whether the agency's response to the benefits administrator's decision was consistent with policy. As explained above, transition to LTD status may or may not mean that an employee can no longer be employed. Under Policy 4.57, employees may be able to continue to work in "LTD-W" status if they are able to perform the essential functions of their job for at least 20 hours a week.[27] Whether the agency's operational needs can accommodate such an arrangement is up to the agency itself, not the benefits administrator. And, as Policy 4.57 specifies, the agency's decision in this regard must comply with the requirements of the federal Americans with Disabilities Act.[28]

In this case, it is not clear that the agency discussed with the grievant what options may be available to him in the absence of STD benefits, in consideration of any other leave balances and/or the possibility of reasonable accommodations under the ADA.[29] Moreover, to the extent that the agency's decision to separate the grievant from employment was retroactive, we are unaware of any DHRM policy provision that would authorize such an action. Therefore, at the hearing, the grievant will have the opportunity to prove, as an independent issue, that the agency's decision to separate him from employment upon denial of his STD claim, and the implementation of that decision, was a misapplication or unfair application of state policy.

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[25] The benefits administrator also defended its determination on grounds that "the VSDP guidelines are clear regarding relapse and use of the benefit." EDR is unable to identify what "guidelines" were considered to be controlling here. Even if such guidelines exist, the fact that they are not readily available for review raises a significant question as to whether they would be an appropriate basis to deny benefits of state employment.

[26] *See VSDP Handbook* at 13.

[27] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 22.

[28] *Id.*; *see* 42 U.S.C. §§ 12102, 12111, 12112; 29 C.F.R. § 1630.2(m).

[29] In order to determine the appropriate reasonable accommodation, it may be necessary for the employer "to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3).

CONCLUSION

For the reasons explained herein, this grievance is qualified for a hearing in full. At the hearing, the grievant will have the burden to prove that the administration of his benefits of employment and his removal from employment were improper.[30]

Within **five workdays** of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear the claims qualified for hearing, using the Grievance Form B. This ruling is not intended to prevent or discourage the parties from resolving the underlying issues outside the context of a hearing. Should the parties wish to pursue resolution of the issues herein prior to a hearing date, EDR is available to assist in such any efforts as desired and appropriate.

EDR's qualification rulings are final and nonappealable.[31]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[30] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(C).
[31] *See* Va. Code § 2.2-1202.1(5).