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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2024-5610
October 13, 2023

The Department of Corrections (the "agency") has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 11945. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 11945, as found by the hearing officer, are as follows:[1]

> The grievant began his employment with the agency in 2007. In 2022, he was employed as a corrections officer. In early October 2021 the grievant was diagnosed with colon cancer. He ceased working on October 13 and filed a claim for [short-term disability] benefits on October 14, 2021. He remained off work until April 14, 2022.
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> In December 2021 the grievant received a second diagnosis - this for liver cancer. When he returned to work in April 2022, he was informed of the provisions in DHRM Policy 4.57 requiring him to be able to work for a minimum of 45 consecutive calendar days. The policy allows an employee to have approved leave during those 45 days without resetting the clock.
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> The grievant took approved leave for a partial day on April 27, 2022, for follow-up regarding the liver cancer. On May 25, 2022, he missed a full day of work for further consultation with physicians regarding the liver cancer. This leave had also been approved in advance. He also took a personal leave day on June 8, 2022.
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> Prior to his leaving work in October 2021 the work schedule of the grievant was such that he had scheduled days off during a "normal" work week of Monday

[1] Decision of Hearing Officer, Case No. 11945 ("Hearing Decision"), August 11, 2023, at 3.

> through Friday. When he returned to work in April 2022, the warden adjusted the schedule of the grievant and had him work eight-hour workdays on a Monday through Friday schedule. The grievant denies that he made this request for a modification of the twelve hour shifts he had prior to his disability claim.
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> On July 5, 2022, the grievant submitted a new claim for [short-term disability] benefits to allow him time to seek and recover from treatment for his liver cancer. The third-party administrator (TPA) of the Virginia Sickness and Disability Program denied this claim on August 28. It found the grievant to be ineligible due to his not having [] worked, or available for work, during the 45 consecutive days commencing April 14, 2022. It ruled that his new claim was a continuation of the claim filed in October 2021. Because the length of the original claim then exceeded the 125 days provided for in Policy 4.57, the TPA transitioned the claim to one for Long Term Disability. With that transition, the agency terminated the grievant from employment, effective August 1, 2023. That date was used to coordinate with the cessation of entitlement to certain benefits, including health insurance, based on his last having worked in July.

The grievant timely grieved his separation from employment, and EDR qualified the grievance for a hearing on grounds that the grievance raised a sufficient question whether state disability policy had been misapplied.[2] A hearing was held on July 31, 2023.[3] In a decision dated August 11, 2023, the hearing officer determined that "the grievant should have been allowed the second, successive period of Short Term Disability benefits as claimed by him on July 5, 2023."[4] The agency now appeals the decision to EDR.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure . . . ."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[6] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

The agency challenges the hearing officer's decision on grounds that it is not responsible for determining the grievant's eligibility for disability benefits, and that the hearing officer likewise lacks authority to determine that issue. The agency also claims that the hearing officer erred in his determination that the grievant was entitled to a second period of short-term disability, in part because this determination was based on grounds not qualified for hearing by EDR.

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[2] EDR Ruling No. 2023-5493.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 5.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[9] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Virginia Sickness and Disability Program

In its request for administrative review, the agency appears to argue that neither the agency nor the hearing officer have authority to override the determinations of the Virginia Sickness and Disability Program's third-party administrator. In support, the agency cites Virginia Code section 51.1-1102, which authorizes the Board of Trustees of the Virginia Retirement System to, among other things, "[c]ontract for the provision of comprehensive case management"[10] with respect to the Virginia Sickness and Disability Program – which it has done by engaging the third-party administrator that denied the grievant's disability claim in this case. The agency further contends that, because the program provides for an appeals process, such claims are "not justiciable under the grievance procedure."[11]

As an initial matter, in general, "*any* management actions or omissions may be grieved," to include issues related to the employee's terms, conditions, and benefits of employment with state agencies.[12] Among the benefits to which state employees are entitled are the disability leave benefits described in DHRM Policy 4.57, *Virginia Sickness and Disability Program*. Like all statewide personnel policies, Policy 4.57 has been developed and interpreted by the DHRM Director,[13] who has "the final authority to establish and interpret personnel policies and procedures and shall have the authority to ensure full compliance with such policies."[14] Notwithstanding the authority granted separately to the Board of Trustees of the Virginia Retirement System, such authority "is not intended to abrogate the final authority of the Director of the Department of Human Resources Management . . . to establish and interpret personnel policy and procedures."[15]

A primary purpose of Policy 4.57 is to "[p]rovide[] eligible employees supplemental replacement income during periods of partial or total disability for both non-occupational and occupational disabilities."[16] To that end, the policy explains maximum entitlements based on qualifying disabilities and months of state service.[17] It specifically addresses entitlements related to successive claims of short-term disability. As it relates to this matter, a new short-term disability period – effectively resetting the maximum entitlements – can begin when an employee "[r]eturn[s] to work full-time/full duty for 45 or more consecutive calendar days after a major

[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] Va Code § 51.1-1102(2).
[11] Request for Administrative Review at 7.
[12] *Grievance Procedure Manual* § 2.4 (emphasis in original).
[13] DHRM Policy 4.57 has defined employee benefits in its current form for almost a decade, having been revised most recently in 2013.
[14] Va. Code § 2.2-1201(A)(14).
[15] *Id.* § 51.1-1101.
[16] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 1.
[17] *Id.* at 13-21.

chronic or non-chronic condition . . . ."[18] By contrast, a subsequent disability period is not a "new" period for purposes of maximum benefits if the employee "again become[s] disabled due to the same condition" within 45 calendar days of returning to full-duty work after the previous period.[19] These policy provisions implement statutory requirements for successive disability claims:

> If a participating employee, after receiving short-term disability benefits, immediately returns to work for less than 45 consecutive calendar days and cannot continue to work, the days worked shall be deemed to have interrupted the short-term disability benefits period, and such days worked shall not be counted for purposes of determining the maximum period for which the participating employee is eligible to receive short-term disability benefits. . . .
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> If a participating employee returns to his position on an active employment basis for 45 consecutive calendar days or longer, any succeeding period of disability shall constitute a new period of short-term disability.[20]

In light of the applicable statutory provisions and DHRM policy described above, EDR finds no basis to conclude that the grievant's benefits of employment, as defined by Policy 4.57, would be outside the scope of the grievance procedure, or the appointed hearing officer's remedial authority. More importantly, we are not aware of any statutory or policy provision granting final authority to the third-party administrator to interpret DHRM policy with regard to state employee benefits. Under Policy 4.57, the third-party administrator "administer[s] the daily operation of the Virginia Sickness and Disability Program." To the extent the agency argues this function extends to developing or interpreting state personnel policies, unilaterally defining state employee benefits, or making personnel decisions for state agencies, EDR does not agree. State employees (and all stakeholders) may rely on applicable DHRM policies, and their interpretations by the DHRM Director, to understand their benefits of employment. To the extent that their employing institutions fail to adequately provide benefits to which they are entitled under DHRM policy, the grievance procedure is an appropriate means to challenge the employer's position, and the hearing officer may accordingly order remedies for any misapplications of policy that are demonstrated by the preponderance of the evidence.

Nevertheless, the agency argues that the hearing officer erred by grounding his analysis in a finding that – contrary to the conclusions of the third-party administrator – the grievant's second disability claim arose out of a different condition than his first claim. The agency maintains that this determination was not within the scope of its responsibility to coordinate employee benefits, particularly in light of the appeals process purportedly offered by the third-party administrator. These arguments do not present a basis for remand.

First, evidence in the record arguably supports the hearing officer's conclusion that the grievant received two different cancer diagnoses that could support distinct periods of disability under DHRM Policy 4.57.[21] Second, even assuming that the hearing officer had abused his

[18] *Id.* at 18.
[19] *Id.* at 17.
[20] Va. Code § 51.1-1111(A), (B).
[21] As the hearing officer noted, the parties presented scant evidence to support either a contention that the grievant received two distinct cancer diagnoses, or alternatively that the grievant's second diagnosis was a continuation of the first for disability purposes. Nevertheless, because this ruling does not turn on this point, EDR will not disturb the

discretion with respect to his consideration of this evidence, his ultimate conclusion was more solidly grounded in his interpretation of Policy 4.57. The hearing officer concluded that "the express language of the policy bars the agency from holding against the grievant the approved leave taken by him for the medical [follow-up and consultation] appointments for liver cancer. All the other absences of the grievant were also approved by the agency and not to be considered by it in calculating the 45 days."[22] He further concluded that the agency would have given the grievant "flawed" advice if its staff told him that absences for medical appointments could jeopardize his eligibility for a new claim.[23] EDR affirms this policy interpretation to the extent it means that medical appointments in and of themselves do not interrupt the 45-calendar-day period after an employee has returned to full-duty work. By law and policy, absences during this period may restart the 45-calendar-day timeline only if they result from the employee's inability to work due to their previously-claimed disability – not merely attending follow-up appointments or consultations based on the provider's availability.[24] To the extent the third-party administrator or the agency applied or applies a different standard, it would not appear to be consistent with DHRM Policy 4.57.

Third, we cannot agree that the putative appeals process for review of the third-party administrator's determinations overrides the agency's responsibility to coordinate benefits to which employees are entitled.[25] Arguably, the need for effective coordination is greater in situations where the agency is on reasonable notice that the third-party administrator's determinations may not be consistent with Policy 4.57. For example, in this case, the agency's witness testified at the hearing that the grievant advised her that the third-party administrator told him there was "no option for an appeal."[26] If so, that would represent a significant failure of the third-party administrator to carry out its case management functions in accordance with Policy 4.57.[27] Under such circumstances, employees may properly request that their employer take corrective actions necessary to secure the benefits of employment to which they are entitled under DHRM policy. To the extent such benefits are not granted, employees may seek and be granted relief through the grievance procedure.

In sum, we find no basis in law or policy to disturb the hearing officer's interpretation of DHRM Policy 4.57 as applied to the evidence before him.

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hearing officer's apparent acceptance of the first scenario, based on the evidence in the record that the agency understood the grievant to have received a "second" diagnosis. *See* Grievant's Ex. A at 3-4; Hearing Recording at 1:01:50-1:03:08 (human resources director's testimony).

[22] Hearing Decision at 5.

[23] *Id.*

[24] The applicable requirements are addressed in more detail in EDR Ruling No. 2023-5493.

[25] *See* DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 31.

[26] Hearing Recording at 1:25:40-1:26:45 (human resources director's testimony).

[27] *See* DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 34. DHRM Policy 4.57 refers to the VSDP Employee Handbook for information about the putative appeals process to which employees have access. The VSDP Handbook contains no provision describing the appeals process or how to appeal a determination by the third-party administrator. The VSDP Handbook only states that if an employee's claim is denied, "the letter will include information about the appeals process." Agency Exs. at 136. There is no record evidence that the grievant in this case received such a letter describing any appeals process.

Hearing Officer's Determination of Qualified Issues

The agency further contends that the hearing officer failed to decide the material issues of the grievance as qualified in EDR Ruling Number 2023-5493, and additionally improperly rendered findings on issues outside the scope of qualification. Specifically, the agency argues that the hearing officer rendered no findings on whether the agency actually misled the grievant about his benefits of employment, or on whether the agency misapplied policy by retroactively terminating the grievant's employment to the date of his second short-term disability claim.[28]

EDR's review of the hearing decision does not suggest any failure to comply with the qualification instructions set out in Ruling Number 2023-5493. The ruling concluded that the grievance "is qualified for a hearing in full."[29] As such, the hearing officer's exploration and analysis of relevant factual issues, such as the medical bases for the grievant's disability claims, was well within his discretion. Moreover, the hearing officer appears to have rendered appropriate findings on the material issues of the case. The decision concluded that the grievant had been wrongly denied a second period of short-term disability benefits under Policy 4.57.[30] While the agency maintains that this determination was the province of the third-party administrator, the hearing officer found that the agency essentially agreed with the third-party administrator's apparently incorrect interpretation of the benefits to which the grievant should be entitled.[31] Accordingly, the hearing decision is fairly read to conclude that the agency failed to adequately coordinate the grievant's benefits under Policy 4.57 – the primary grounds on which EDR had qualified the grievance for hearing.[32]

Finally, we decline to remand the hearing decision on grounds that the hearing officer failed to address the grievant's retroactive termination. We note that the hearing officer's reasoning for declining to address this issue is not entirely clear, as the grievant's entitlement to a second period of short-term disability effectively means that his termination at that time would not have been consistent with policy.[33] Nevertheless, it appears that the hearing officer declined to order restoration of employment and/or benefits back to a date certain, as the grievant's ability to return to work at any point was and is unknown. Instead, the hearing officer indicated that relief would be based on appropriate determinations of the agency and third-party administrator regarding the grievant's ability to return to work following the second short-term disability period that should have been granted.[34]

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[35] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit

[28] The agency maintains that no such misapplications of policy were supported by the evidence.
[29] EDR Ruling No. 2023-5493, at 8.
[30] Hearing Decision at 5.
[31] *Id.* at 4, 5.
[32] *See* EDR Ruling No. 2023-5493, at 4-7.
[33] *See* Hearing Decision at 5.
[34] *Id.*
[35] *Grievance Procedure Manual* § 7.2(d).

court in the jurisdiction in which the grievance arose.[36] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[37]

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[36] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[37] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).