Issue: Qualification – Benefits (VSDP); Ruling Date: February 13, 2017; Ruling No. 2017-4486; Agency: Department of Motor Vehicles; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution[1]

QUALIFICATION RULING

In the matter of the Department of Motor Vehicles
Ruling Number 2017-4486
February 13, 2017

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 December 19, 2016 grievance with the Department of Motor Vehicles ("agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about May 17, 2016, the grievant began receiving short-term disability ("STD") benefits under the Virginia Sickness and Disability Program ("VSDP").[2] The grievant returned to work without restrictions on June 20. The grievant ceased working on June 22 and resumed receiving STD benefits as of that date. On June 27, the grievant received notice that the agency was considering the issuance of disciplinary action due to an incident that occurred on June 22.

The grievant subsequently provided the agency with documentation from his doctor that he was released to return to work on November 7, 2016. The agency notified the grievant that, although he would no longer be disabled and return to work on November 7, he should not physically report to work. The grievant would instead be placed on pre-disciplinary leave with pay while the agency determined whether disciplinary action should be issued in relation to the June 22 incident. The grievant subsequently provided the agency with additional medical documentation that he was not able to return to work. The third-party administrator ("TPA") of the VSDP determined that the grievant's STD benefits had been exhausted on November 9, 2016 and that his inability to return to work on November 10 was a continuation of his prior disability for which he had received STD benefits. As a result, the grievant was transitioned to long-term disability ("LTD") and separated from employment with the agency.

The grievant filed a grievance on or about December 19, 2016, alleging that "problems" at the agency had "created a toxic work environment" and a "stress related issue." The grievance contains a significant amount of background information about the grievant's medical condition(s), his disability and STD status, his work history with the agency, and other issues. As relief, the grievant states that he "would have liked to come back to work" and wants to "continue with [his] health care," "find future employment," and "cash in [his] state service

[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as "EDR" in this ruling to alleviate any confusion. EDR's role with regard to the grievance procedure remains the same post-merger.
[2] *See* Va. Code § 51.1-1100 *et seq*.; DHRM Policy 4.57, *Virginia Sickness and Disability Program*.

credit." Ordinarily, a grievance involving a separation on LTD would proceed as an expedited grievance.[3] In this case, however, the parties have agreed to waive the single management step and the agency head's qualification decision and proceed directly to EDR's qualification ruling.

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] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[5] Thus, claims relating to issues such as to the establishment or revision of wages, salaries, position classifications, or general benefits 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.[6]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[7] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action constitut[ing] 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."[8] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9] Because the grievant has effectively lost his position with the agency, we will assume, for purposes of this ruling only, that he experienced an adverse employment action.

Virginia Sickness and Disability Program

Although the grievant does not specifically allege any error in the series of events described in the "Facts" section above, he appears to dispute his transition to LTD and resulting separation from employment with the agency.[10] By statute and under the DHRM Policy 4.57, *Virginia Sickness and Disability Program* (the "VSDP Policy"), "short-term disability benefits for participating employees shall commence upon the expiration of a seven-calendar-day waiting

[3] *Grievance Procedure Manual* §§ 2.5, 3.4.
[4] *See Grievance Procedure Manual* § 4.1.
[5] *See* Va. Code § 2.2-3004(B).
[6] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[7] *See Grievance Procedure Manual* § 4.1(b).
[8] Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[9] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[10] This ruling only considers whether the grievant has raised a question as to whether his separation from employment was the result of discrimination, retaliation, discipline, or a misapplication or inconsistent application of state and/or agency policy. While the grievant discusses his history of prior employment-related issues in the grievance, and could arguably be attempting to challenge those management actions in the grievance, no effectual relief to address or resolve those issues is available through the grievance procedure because the grievant is no longer employed by the agency. As discussed more fully below, EDR finds no basis to conclude that the grievant's separation was improper, and, thus, any other issues presented in the grievance are not susceptible to relief through the grievance process.

period."[11] On the eighth calendar day, and after authorization by the TPA, STD benefits are provided for a maximum of 125 work days.[12] In this case, the grievant submitted his initial request for STD to the TPA on May 10, 2016. The grievant began receiving STD benefits on May 17, the eighth calendar day after his initial date of disability. The grievant returned to work briefly on June 20 and 21, then resumed receiving STD benefits on June 22. Counting 125 workdays from May 17, and excluding June 20 and 21 when the grievant was at work, the TPA's records accurately reflect that the final day of STD for the grievant was November 9, 2016.[13] Prior to his anticipated return on November 7, the grievant provided the agency and the TPA with documentation indicating that he was unable to return to work, apparently on either that date or by November 10.[14]

The VSDP statutes and Policy further provide that "long-term disability benefits for participating employees shall commence upon the expiration of the maximum period for which the participating employee is eligible to receive short-term disability benefits . . . ."[15] "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."[16] LTD status is in effect when: (1) the employee "has received the maximum STD benefit and is unable to [return to work]"; (2) the employee is "working any schedule outside [his] agency"; or (3) the employee is "unable to continue working 20 hours a week in LTD-W."[17] Furthermore, a "[a] participating employee's disability which is related or due to the same cause or causes as a prior disability for which supplemental long-term disability benefits were paid shall be deemed to be a continuation of the prior disability if the employee is eligible for benefits payable under the Act . . . and returns to a position on an active employment basis for less than 125 consecutive work days."[18]

The TPA determined that medical condition preventing the grievant from returning to work on November 10, 2016 was a continuation of his prior disability. EDR has reviewed nothing to suggest any error in the TPA's determination that the grievant's medical condition on November 10 was anything other than a continuation of his previous disability, and the grievant does not appear to argue otherwise. Thus, EDR finds no basis to conclude that the TPA erred by enrolling the grievant in LTD at that time.

If an employee reaches LTD status, he is not guaranteed return to his pre-disability position and the agency "can recruit and fill [his] pre-disability position."[19] In other words, once an employee is moved into LTD, the employee is not considered an employee of the Commonwealth. DHRM, the agency charged with implementation and interpretation of the Commonwealth's personnel policies, has held that once an employee has been placed into LTD, the employee has been separated from employment under state policy *unless the agency has*

[11] Va. Code § 51.1-1110(A); DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.
[12] Va. Code § 51.1-1110(B); DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.
[13] "The 125-workday period is based on a Monday-through-Friday workweek and includes paid holidays." Va. Ret. Sys., Virginia Sickness and Disability Handbook 14. Thus, any holidays that fell between May 17, 2016 and November 9, 2016 would have been factored into the 125-workday period of the grievant's STD.
[14] The information provided by the parties does not indicate whether the grievant would potentially have been able to return to work on any particular date, or whether his disability would have continued indefinitely.
[15] Va. Code § 51.1-1112(A); DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.
[16] DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.
[17] *Id.*
[18] Va. Code § 51.1-1124(A); DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.
[19] DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.

agreed to hold the position open for the employee.[20] Here, it does not appear that the agency agreed to hold the grievant's position open after he was enrolled in LTD. While EDR is sympathetic to the grievant's situation and concerns with his separation from employment, there is no basis to conclude that the agency violated any mandatory provision of the VSDP Policy when it moved the grievant into LTD, effectively separating him from employment with the Commonwealth. Likewise, there is no indication that the agency's actions were so unfair as to amount to a disregard of the intent of the applicable policy. Accordingly, the grievance does not qualify for a hearing on this basis.

Americans with Disabilities Act

While not presented as such, the grievant's apparent challenge to his separation on LTD arguably presents a claim that the agency did not comply with the requirements 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*."[21] Under this policy, "'disability' is defined in accordance with" the ADA, the relevant law governing disability accommodations.[22] Like DHRM Policy 2.05, *Equal Employment Opportunity*, the ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.[23]

A qualified individual is defined as a person with a disability, who, "with or without reasonable accommodation," can perform the essential functions of the job.[24] An individual is "disabled" if she "(A) [has] a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment . . . ."[25] As a general rule, an employer must make reasonable accommodations to the known physical or mental limitations of a qualified employee with a disability, unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business [or government]."[26]

Even assuming, for purposes of this ruling only, that the grievant was a qualified individual with a disability under the ADA, EDR has reviewed no evidence to suggest that the grievant's separation on LTD was the result of discrimination because of a disability, or that the agency could have made a reasonable accommodation that would have allowed the grievant to perform the essential functions of his position.[27] The grievant has presented nothing to support

[20] *See* EDR Ruling No. 2006-1334.
[21] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).
[22] *Id.*; *see* 42 U.S.C. §§ 12101 *et seq.*
[23] 42 U.S.C. § 12112(a).
[24] *Id.* § 12111(8); 29 C.F.R. § 1630.2(m). The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. § 1630.2(n).
[25] 42 U.S.C. § 12102(1).
[26] *Id.* § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.").
[27] In some circumstances, leave may be considered a reasonable accommodation under the ADA. *See*, e.g., Halpern v. Wake Forest Univ. Health Scis., 669 F.3d 454, 465-66 (4th Cir. 2012).. In this case, however, there is nothing in

either of these potential allegations, nor has EDR identified any such information in the grievance record. Accordingly, the grievance does not qualify for a hearing on this basis.[28]

Family and Medical Leave Act

Finally, the grievant's request for qualification could be interpreted as a claim that the agency has misapplied and/or unfairly applied the statutory and/or policy provisions of the Family and Medical Leave Act ("FMLA").[29] DHRM Policy 4.20, *Family and Medical Leave* (the "FMLA Policy") provides "guidance regarding the interaction of the FMLA and the Commonwealth's other Human Resource policies" for state employees.[30] Under the FMLA Policy, eligible employees are entitled to receive "up to 12 weeks of unpaid family and medical leave per year because of their own serious health condition . . . ."[31] "Upon returning from family and medical leave, an employee is entitled to be reinstated to [his] original position, or an 'equivalent position.'"[32] If the grievant was eligible for family and medical leave when he was enrolled in LTD on November 10, 2016, then the agency may have been required hold his position open for his reinstatement until his available family and medical leave was exhausted.

To be eligible for family and medical leave, an employee must "have worked for at least 1,250 hours in the previous 12-month period . . . ."[33] The FMLA Policy provides that "[e]ligibility determinations are made as of the date that the family and medical leave is to begin."[34] In this case, then, the grievant must have worked at least 1,250 hours in the preceding twelve months to have been eligible for family and medical leave when he was enrolled in LTD. According to the agency and EDR's review of the grievance record, the grievant was not eligible for family and medical leave at any point during the relevant time period of his absence on STD or LTD at issue in this case. As a result, he was not eligible for family and medical leave under the provisions of the FMLA Policy when he was enrolled in LTD.[35] The grievance does not, therefore, raise a question as to whether the agency may have misapplied or unfairly applied the FMLA Policy to the grievant or whether the agency's actions were so unfair as to amount to a

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the grievance record to indicate that an additional period of leave would have enabled the grievant to return to work or, indeed, whether he would have been able to return to work at any point after November 10.

[28] This ruling discusses only those portions of the ADA that are applicable in this case. For additional discussion about other aspects of the ADA, as well as its application in the context of the grievance procedure, see, for example, EDR Ruling Number 2016-4238 and EDR Ruling Number 2014-3666, as well as the authorities cited therein.

[29] 29 U.S.C. § 2601 *et seq.*

[30] DHRM Policy 4.20, *Family and Medical Leave*.

[31] *Id.*; *see* 29 U.S.C. § 2612(a)(1).

[32] DHRM Policy 4.20, *Family and Medical Leave*; *see* 29 U.S.C. § 2614(a)(1). An "equivalent position" is defined by the FMLA Policy as "one with the same pay, benefits and working conditions (shift and schedule) and the same or substantially similar duties, conditions, privileges, and status which require equivalent skill, effort, responsibility and authority." DHRM Policy 4.20, *Family and Medical Leave*; *see* 29 U.S.C. § 2614(a)(1)(B).

[33] DHRM Policy 4.20, *Family and Medical Leave*; *see* 29 U.S.C. § 2611(2)(A). The FMLA Policy further requires the employee to have been ""employed by the Commonwealth for a total of at least 12 months in the past seven years . . . ." DHRM Policy 4.20, *Family and Medical Leave*. There is no dispute in this case that the grievant satisfied this eligibility requirement.

[34] DHRM Policy 4.20, *Family and Medical Leave*.

[35] Under the VSDP Policy, family and medical leave and VSDP leave run concurrently. DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*. Even assuming the grievant was eligible for family and medical leave when his absence on STD began, he was disabled and unable to work for more than twelve weeks, and thus would have had no remaining family and medical leave to cover his continued absence at the time he transitioned to LTD on November 10.

disregard of the intent of the FMLA Policy.[36] Accordingly, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.[37]

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[36] The FMLA Policy further provides that "[e]mployees who are not eligible for family and medical leave at the beginning of a period of approved leave may become eligible during this period and begin family and medical leave once he/she meets the eligibility requirements." DHRM Policy 4.20, *Family and Medical Leave*. Here, calculating the grievant's eligibility for FMLA from any date after May 17, 2016 would not alter the result such that he would have been eligible for family and medical leave at some point.

[37] *See* Va. Code § 2.2-1202.1(5).