Issues: Qualification – Benefits/Leave (FMLA and VSDP); Ruling Date: September 10, 2014; Ruling No. 2015-3964; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2015-3964
September 10, 2014

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 June 12, 2014 grievance with Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant was employed by the agency as a Unit Manager. On or about July 29, 2013, the grievant began receiving short-term disability ("STD") benefits under the Virginia Sickness and Disability Program ("VSDP").[1] The grievant returned to work with a modified schedule on or about January 18, 2014.[2] During this time period, he was considered by the agency and the third-party administrator ("TPA") to be on long-term disability working ("LTD-W") status. The grievant resumed working without restrictions on or about February 17 and ceased receiving LTD-W benefits at that time.[3]

The grievant was out of work due to illness from April 7 to April 11, 2014. He did not provide the agency with documentation authorizing him to return to work after his absence. The grievant met with the Warden and the Human Resource Officer ("HRO") at his facility on April 15 to discuss his absence and related medical issues. After the meeting, the grievant left the facility. He apparently did not return to work after April 15. The TPA determined that the grievant was disabled as of April 16 and that his current disability was a continuation of the prior disability for which he had received STD and LTD-W benefits. As a result, he was transitioned to long-term disability ("LTD") and separated from employment with the agency. The agency mailed the grievant a letter explaining his change in status to LTD on June 3, which the grievant received on or about June 10.

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[1] *See* Va. Code § 51.1-1100 *et seq.*; DHRM Policy 4.57, *Virginia Sickness and Disability Program*.
[2] Friday, January 17, 2014 and Monday, January 20, 2014 were state holidays. Although the grievant ceased receiving STD benefits after January 17, he did not physically return to work until January 21. For purposes of this ruling, we will consider the grievant as having returned to work on January 18 because he was no longer receiving STD benefits as of that date.
[3] Monday, February 17, 2014 was a state holiday. Although the grievant's doctor released him to work without restrictions on that date and his LTD-W ceased on that date, he did not actually begin working without restrictions until the following day, February 18. For purposes of this ruling, we will consider the grievant as having been released to work with no restrictions on February 17 because he was no longer receiving LTD-W benefits as of that date.

The grievant filed a grievance on or about June 12, 2014, alleging that he was "never notified or given the opportunity to obtain health insurance" prior to being placed on LTD. The grievant further argues that the Warden improperly ordered him to leave the facility at the conclusion of the meeting on April 15, despite his ability to continue to work at that time.[4] After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals 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.[5] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[6] 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.[7] In this case, the grievant asserts that the agency either misapplied or unfairly applied DHRM Policy 4.57, *Virginia Sickness and Disability Program* (the "VSDP Policy").

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a 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 that involve "adverse employment actions."[8] 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."[9] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[10] 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

By statute and under the VSDP Policy, "short-term disability benefits for participating employees shall commence upon the expiration of a seven-calendar-day waiting period."[11] On the eighth calendar day, and after authorization by the TPA, STD benefits are provided for a

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[4] There does not appear to be any dispute that the grievant would have been unable to work from April 17 until early June.
[5] *See Grievance Procedure Manual* § 4.1.
[6] *See* Va. Code § 2.2-3004(B).
[7] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[8] *See Grievance Procedure Manual* § 4.1(b).
[9] Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[10] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[11] Va. Code § 51.1-1110(A); DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.

maximum of 125 work days.[12] LTD-W is an LTD-related "income replacement benefit" that "allows employees to continue to work for their agencies from STD working status . . . ."[13] LTD-W status is in effect when "[e]mployees working during STD . . . 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."[14]

In this case, the grievant submitted his initial request for STD to the TPA on July 22, 2013. The grievant began receiving STD benefits on July 29, the eighth calendar day after his initial date of disability. Counting 125 workdays from July 29, the agency's and the TPA's records accurately reflect that the final day of STD for the grievant was January 17, 2014.[15] The grievant was approved by his doctor to return to work on January 17, his final day of STD. Because January 17 was a state holiday, however, the grievant did not actually work on that date, although he was considered to be on STD working status. As a result, the grievant was approved for LTD-W by the TPA beginning January 18, with a restriction to working 20 hours per week.[16] He continued with this modified schedule until February 17, at which time he was released to work with no restrictions. The grievant successfully worked with no restrictions through April 15. The grievant left work on that date and was unable to continue working afterward because of his disability.

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 . . . ."[17] "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."[18] 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."[19] 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."[20]

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[12] Va. Code § 51.1-1110(B); DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.
[13] DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.
[14] *Id.*
[15] "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 (2014). Thus, any holidays that fell between July 29, 2013 and January 17, 2014 would have been factored into the 125-workday period of the grievant's STD.
[16] The grievant claims that he attempted to return to work on January 16, 2014 "with a Doctor's note explaining [his] limited work hours request," but was "sent back home and informed [he] needed to meet with" agency management before he could return to work. The information reviewed by EDR indicates that the grievant was approved by the agency and the TPA to return to work on January 17. Because Friday, January 17 and Monday, January 20 were state holidays, the grievant was unable to meet with agency management and physically return to work until January 21.
[17] Va. Code § 51.1-1112(A); DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.
[18] DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.
[19] *Id.*
[20] Va. Code § 51.1-1124(A); DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.

The TPA determined that the grievant's disability that began on April 16, 2014 was a continuation of his prior disability.[21] A total of 42 workdays elapsed between February 17, when the grievant ceased receiving LTD-W benefits, and April 15, his last workday. There was no error in the TPA's determination that the grievant's disability beginning on April 16 was a continuation of his previous disability, and thus the TPA did not err 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."[22] 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 agreed to hold the position open for the employee.*[23] Here, it does not appear that the agency agreed to hold the grievant's position open after he was enrolled in LTD. There is, therefore, no basis for EDR to conclude that the agency violated any mandatory provision of the VSDP Policy when it moved him 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.

Even assuming that the grievant's claim that the Warden and HRO ordered him to leave work on April 15 is true, such an action would have no effect on the outcome in the case. It appears that the grievant was hospitalized on April 17, two days after his meeting with the Warden and the HRO. Even if the grievant had been able to work on April 15 and 16, there is no evidence to suggest that the grievant would have been able to work beyond that time.[24] Altering the grievant's LTD enrollment date to begin on April 17 would mean that a total of 43 workdays would have passed since he ceased receiving LTD benefits on February 17, rather than the 42 workdays that had elapsed as of April 16. Because an employee's disability "which is related or due to the same cause as a prior disability for which" LTD benefits were paid "shall be deemed to be a continuation of the prior disability" if the employee returns to his "position on an active employment basis for less than 125 consecutive workdays," the TPA would have enrolled the grievant in LTD as of April 17 if he had continued to work until that time. Any improper action on the agency's part that may have occurred during the meeting on April 15 did not alter the grievant's eligibility for VSDP benefits in this case.

Likewise, assuming that the notice provided to the grievant by the agency of his enrollment in LTD was deficient in some way would also have no effect on the resolution of this case. While it would certainly be a best practice for the agency to inform employees of any changes to their VSDP status as quickly as possible, there does not appear to be any explicit requirement in the VSDP Policy that states as much. We cannot find that any assumed action or

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[21] It appears that the grievant initiated a new STD claim with the TPA at some time after April 15; the TPA determined that the grievant should instead be transitioned to LTD.
[22] DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.
[23] *See* EDR Ruling No. 2006-1334.
[24] Based on information submitted by the grievant, it appears he does not dispute that he was unable to work from April 17 through early June.

inaction on the agency's part related to the grievant's notification of his transition to LTD in this case should operate to extend his VSDP benefits and enable him to return to work.[25]

Family and Medical Leave Act

While not presented as such, the grievant's request for qualification arguably asserts 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").[26] 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.[27] 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 . . . ."[28] "Upon returning from family and medical leave, an employee is entitled to be reinstated to [his] original position, or an 'equivalent position.'"[29] If the grievant was eligible for family and medical leave when he was enrolled in LTD on April 16, 2014, then the agency may have been required hold his position open for his reinstatement until his available family and medical leave was expended.[30]

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 . . . ."[31] The FMLA Policy provides that "[e]ligibility determinations are made as of the date that the family and medical leave is to begin."[32] In this case, then, the grievant must have worked at least 1,250 hours in the 12 months preceding April 16, 2014 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 had not worked 1,250 hours between April 16, 2013 and April 15, 2014.[33] 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. 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

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[25] Furthermore, it appears the TPA mailed the grievant a letter informing him that he was enrolled in LTD on May 22, 2014. The grievant was also notified of his enrollment in LTD when he spoke with a representative of the TPA via telephone on or about June 3, 2014. The grievant received notice that he had been transitioned to LTD from the TPA regardless of any delay on the agency's part.

[26] 29 U.S.C. § 2601 *et seq.*

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

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

[29] 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).

[30] Under the VSDP Policy, family and medical leave and VSDP leave run concurrently. DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*. As a result of the grievant's previous absences from work while he was on STD and LTD-W, his available family and medical leave may have been less than the full 12 weeks, although the amount of leave that may have been available to the grievant is immaterial to the outcome in this case.

[31] 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.

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

[33] The grievant was on STD and LTD-W for a significant portion of this time period. Assuming the grievant worked 40 hours per week every week, and excluding only the time during which he was on STD or LTD-W, he could not have worked more than 968 hours between April 16, 2013 and April 15, 2014.

agency's actions were so unfair as to amount to a disregard of the intent of the FMLA Policy.[34] Accordingly, the grievance does not qualify for a hearing on this basis.[35]

EDR's qualification rulings are final and nonappealable.[36]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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[34] 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." *Id.* Here, calculating the grievant's eligibility for FMLA from any date after April 16 would not alter the result such that he would have been eligible for family and medical leave at some point.

[35] The grievant appears to further dispute his annual performance evaluation for the 2012-2013 evaluation cycle. The grievant received his evaluation on or about January 30, 2014, when he had returned from STD. The grievant filed his grievance to dispute his separation from employment on LTD and his performance evaluation on or about June 12, 2014. The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance. Va. Code § 2.2-3003(C); *Grievance Procedure Manual* §§ 2.2, 2.4. Because the grievant did not file a grievance to challenge his performance evaluation within 30 calendar days of his receipt of his annual performance evaluation, the grievance is not timely to challenge that issue, and it will not be addressed in this ruling.

[36] *See* Va. Code § 2.2-1202.1(5).