

Issue: Qualification; Compensation/Sick Leave; Discrimination-Disability; Ruling Date: July 17, 2002; Ruling #2002-096; Agency: Department of Corrections; Outcome: not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2002-096
July 17, 2002

The grievant has requested a ruling on whether his October 31, 2001 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that management misapplied policy when he was not allowed to return to work on an adjusted work assignment (light duty).¹ For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is a Corrections Officer with DOC. On May 24, 2001 he suffered a back injury on the job. He requested and was granted light duty accommodations for ninety days, beginning June 19 and ending September 16. However, the grievant's doctor later determined that he was not ready to return to work, and excused him from work from September 8 until October 4. During this time, the grievant's light duty accommodations expired.

In October, the grievant's doctor certified that he was ready to return to work on light duty. However, DOC informed the grievant on October 9 that his light duty had expired and that he should not return to work unless he could perform the full duties of

¹ The grievant's Form A indicates that the issue is discrimination. The *Grievance Procedure Manual* defines discrimination as "different or hostile treatment based on race, color, religion, political affiliation, age, disability, national origin, or sex." *Grievance Procedure Manual*, "Definitions." Here, the grievant is not claiming that he was treated differently than other employees because of his membership in a protected class. Rather, he is challenging the application of DOC's adjusted work assignment policy. Specifically, he claims that others were allowed to remain on light duty while he was not. Therefore, his claim will be considered a misapplication of policy claim, not a discrimination claim. It should be noted, however, that even if the grievant had asserted a disability claim, such a claim would fail. Under the Americans with Disabilities Act (ADA), an employer is required to provide a reasonable accommodation to an employee with a disability, if an accommodation will enable the employee to perform the essential functions of the job. Here, rather than offering the grievant continued light duty service, DOC transferred the grievant to another position that allowed him to work within his limitations. While the grievant would have preferred a light duty accommodation, the ADA does not require that an employee be given the accommodation of his choice, only that a reasonable accommodation be provided.

his job. The grievant was charged 144 hours of sick leave to cover his absence from October 10 through October 31.² He claims that during this time period, he should have been allowed to return to work with an adjusted light duty accommodation. He further claims that other employees have been granted extensions of their accommodations, while he was limited to only ninety days of light duty. As relief, the grievant requests that he be compensated 144 hours of sick leave.

DISCUSSION

For a policy claim to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy provision, or acted in a manner so unfair as to amount to an abuse of discretion under the applicable policy.

Misapplication of Policy

Under DOC policy, “[i]f the employee cannot perform the essential functions of the job, he may be temporarily assigned the duties of a vacant position or assigned temporary duties outside his current job classification . . . pending a final decision regarding the appropriate accommodation.”³ In this case, DOC assigned the grievant light duty from June 19 until September 16. DOC Policy stipulates that this type of adjusted work assignment generally shall be limited to ninety days, as was done in this case.⁴ The policy further notes that “[e]xtensions should only be granted if the physician certifies that the employee is making significant rehabilitative progress which should result in return to full duty in the near future.”⁵ In this case, the grievant’s doctor provided no such notice to DOC. Furthermore, the grievant consistently indicated to DOC that his condition would not improve. When the grievant’s ninety days of light duty expired, he was allowed to use his leave balances, pending review of his accommodation request under the Americans with Disabilities Act (ADA). Policy did not require DOC to place the grievant on light duty for more than ninety days. Indeed, policy states that adjusted work assignments generally shall not exceed ninety days. Therefore, DOC’s decision not to extend the grievant’s adjusted work assignments is consistent with policy and this issue does not qualify for a hearing.

Unfair Application of Policy

² The grievant exhausted his sick leave on December 15, then went on leave without pay status until February 28. However, in this grievance, the grievant is only concerned about the sick leave taken on the October dates.

³ DOC Policy 5-54.16.B.

⁴ DOC Policy 5-52.10. “The performance of adjusted work assignments shall not exceed ninety (90) calendar days unless extended by the Organizational Unit Head and approved by the Administrator of Employee Relations and Training.”

⁵ *Id.*

The grievant further claims that DOC applied its policy differently to two other employees. Specifically, the grievant claims that these employees were granted extensions pending a review from the agency's ADA committee. The agency's human resources office investigated this allegation and determined it not to be founded. This Department's investigation revealed that of the two employees, Employee A was not granted an extension, but accepted another position within DOC. Human resources conceded that this employee's situation is very similar to the grievant's; however, this employee was willing to move into another position that suited him while the grievant was not.

The second employee, Employee B, may have been allowed a two or three day extension. However, he was waiting for approval for disability retirement. DOC distinguishes this situation from the grievant's because there was an "end in sight" to Employee B's light duty. On the other hand, the grievant's situation was uncertain. As noted above, there was no indication that the grievant was improving or would be able to eventually perform the essential functions of his job. Therefore, it appears that DOC applied its policy fairly and this issue does not qualify for a hearing.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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