

Issue: Qualification/Discrimination/Disability; Ruling Date: February 6, 2003; Ruling #2002-184; Agency: Department of Rehabilitative Services; Outcome: qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Rehabilitative Services/ No. 2002-184
February 6, 2003

The grievant has requested a ruling on whether his August 27, 2002 grievance with the Department of Rehabilitative Services (DRS) qualifies for a hearing. The grievant claims that the agency misapplied or unfairly applied state policy when it failed to return him to work in August 2002 following a period of disability. For the following reasons, this grievance qualifies for a hearing.

FACTS

The grievant was employed as a teacher at a DRS facility for ten years. On February 6, 2002, he was placed under a physician's care and began a seven-calendar day waiting period prior to receiving short-term disability (STD) benefits under the Commonwealth's Virginia Sickness and Disability Program (VSDP). The applicable VSDP Handbook advises employees that "your short-term disability benefits begin after a seven-calendar day waiting period." Further, "[o]n the eighth calendar day, after authorization by VSDP, short-term disability benefits provide days of income replacement . . . [and] [s]hort-term disability payments continue for up to 180 calendar days."¹ The grievant did not work at all during his period of STD, and thus had not been placed in what is termed "STD-Working" status.

The grievant asserts that he phoned his supervisor weekly to update her on his health status during his period of STD. On July 24, 2002, he notified his supervisor of his tentative date of return (Monday, August 5, 2002), with possible modifications recommended by his doctor. His doctor had recommended that the grievant initially return to work part-time (20 hours per week) for two weeks beginning August 5, then begin full-time on August 19. According to the grievant, his supervisor was extremely happy to hear that he would be returning to work soon.

¹ Virginia Sickness and Disability Program (VSDP) Handbook 2002, "Short-Term Disability," page 7.

On August 1, the Thursday before his planned return on August 5, the grievant contacted the facility's Human Resources office and his supervisor to confirm his plans to return to work. During this phone conversation with the agency, he asserts that no one indicated there might be a problem with his planned return to work on August 5. Indeed, VSDP's Third Party Administrator had asked DRS on or about August 1 whether DRS could accommodate the grievant's doctor's recommendation that he return on August 5 for two weeks of part-time work, followed by full-time work.² Agency management at the facility responded in writing that it could indeed accommodate the doctor's recommendation.³

On Friday, August 2, the grievant phoned the agency and was informed that Human Resources staff would contact him later in the day about his work schedule. However, at some point that same day, DRS concluded that the grievant was precluded from returning to his job on August 5 as planned, because he had not been placed in STD-Working (part-time) status as of his 180th day of STD, which DRS had determined was August 2.⁴

VSDP "FAQ's" for state human resource professionals advise that an employee cannot be placed in LTD-Working (part-time) status *unless* he has already been placed in STD-Working (part-time) status on his 180th day of STD.⁵ Contrary to DRS's step responses to this grievance, the FAQ's also indicate that just *one hour* of work on the

² See e-mail correspondence from facility Human Resources, dated August 1, 2002, 4:13 p.m.

³ See e-mail correspondence from facility management, dated August 2, 2002, 12:01 p.m. ("we can accommodate the recommended job modifications as requested . . . [the grievant] will report . . . on Monday [August 5, 2002] at 12:30 p.m. and work until 4:30 p.m.").

⁴ The 2002 VSDP Handbook may be read to expressly indicate otherwise. That Handbook advises employees that "your short-term disability benefits begin after a seven-calendar day waiting period." Further, "[o]n the eighth calendar day, after authorization by VSDP, short-term disability benefits provide days of income replacement . . . [and] [s]hort-term disability payments continue for up to 180 calendar days." VSDP Handbook 2002, "Short-term Disability," page 7. Later on page 10, the Handbook again states that "[l]ong-term disability benefits begin at the conclusion of the *180 calendar days of short-term disability benefits*." VSDP Handbook 2002, "Long-term Disability," page 10 (emphasis added). Further, on page 31, the term "Long-Term Disability-Working" is expressly defined as a "period of approved disability absence that begins *after 180 calendar days of short-term disability benefits*." VSDP Handbook 2002, "Definitions," page 31 (emphasis added). See also *id.*, definition of "Long-Term Disability-Not Working" (a "period of approved disability absence that begins *after 180 calendar days of short-term disability benefits*") (emphasis added). This language appears to indicate that short-term disability benefits (STD income replacement payments) begin *after* the initial seven calendar day waiting period and continue for up to 180 calendar days. Applying that construction in the grievant's case, the eighth calendar day, his first day of receiving short-term disability benefits, would have been February 13, 2002. If February 13 was the first day of receiving short-term disability benefits, then August 11, not August 4, would have been the 180th day of short-term disability benefits. In that event, it appears that the grievant could have returned to work as planned: 20 hours the week of August 5 (as STD-working); 20 hours the week of August 12 (as LTD-working); and 40 hours a week beginning on August 19 as a regular salaried employee. There is similar language in the 2000 VSDP Handbook, with a similar outcome under such a construction. See VSDP Handbook 2000, at pages 7, 10, and 28 (and if using a 125 *workday* period of STD benefits, rather than 180 calendar days, the grievant's 125th *workday* of STD benefits would have occurred *after* August 5 as well).

⁵ See VSDP FAQ's for VSDP Coordinators and Human Resource Departments, pages 3-4.

180th day of STD would place an employee in STD-Working status.⁶ Apparently DRS had determined that because the grievant had not been placed in STD-Working (part-time) status before Monday, August 5 (i.e., had not worked as little as one hour on Friday, August 2), he was not only precluded from returning on August 5 under LTD-Working (part-time) status, but he was also *required* to be placed on long-term disability status as of August 5.

When the grievant had not heard from the agency by 2:30 p.m. on August 2, he phoned again. At this point, management informed the grievant that he could not return to work on August 5 as planned (working 20 hours per week for the first two weeks), because he had not already been on STD-Working status on his 180th day of STD, and therefore, under VSDP policy, he must not return to work, but instead must begin to receive LTD income replacement benefits on August 5. Under VSDP, "return to your pre-disability position is not guaranteed after you begin LTD," whereas an employee placed in his pre-disability position as LTD-Working (part-time) can continue working unless the agency determines that it cannot continue to accommodate the restrictions.⁷ The grievant did not want LTD status; rather, he sought a return to his job on August 5, with an initial two-week accommodation of working 20 hours per week, followed by working 40 hours per week. Unfortunately for the grievant, DRS did not arrive at its conclusion about the VSDP's application to his case until the last possible workday before his scheduled return on August 5.⁸

Later during the afternoon of August 2, after concluding that the grievant's return to his pre-disability position would no longer be guaranteed if he began LTD on August 5, DRS notified VSDP's Third Party Administrator that it could not accept the grievant's job modifications because DRS's internal hiring policy considers an employee's position "vacant" once he begins LTD. In addition, DRS had determined that to return an employee full-time, full-duty to his position after being placed in LTD status would also require an Agency Hiring Request approved by its Cabinet Secretary.⁹ As discussed

⁶ VSDP FAQ's for VSDP Coordinators and Human Resource Departments, page 2 ("STD working status does not require any minimum hours of work"). Thus, there is no 20-hour minimum for STD-Working status. In any event, it appears that on August 2, management realized that if the grievant's physician had returned him to work even one day earlier, the issue of LTD-Working status could have been resolved. See e-mail correspondence from DRS, dated August 2, 2002, 2:40 p.m. The agency stated during this Department's investigation, however, that they were not obligated to inform the grievant of the LTD-Working rule because they can only rely on what the doctor recommends and on what the third party administrator says.

⁷ VSDP Handbook 2002, "Long-Term Disability," page 10; "FAQ's for VSDP Coordinators and Human Resource Departments," pages 4-5.

⁸ The VSDP is extremely complex, and its components are found in several different documents, none of which contain all requirements and provisions: DHRM's VSDP Policy No. 4.57; VSDP Handbook 2002; the "FAQ's For VSDP Coordinators and Human Resource Departments," and the "VSDP Implementation Procedures," which was distributed to agency Human Resource offices on January 7, 2000, and can be obtained upon request from the Virginia Retirement System.

⁹ See Executive Order No. 9, dated February 22, 2002. The Order states that "[p]rior written approval by the appropriate Secretary must be received before an agency may advertise or fill any vacant position."

above, as late as noon on August 2, agency management had stated that it could accommodate the grievant's return to work on August 5 on a part-time basis for the first two weeks. However, once the agency concluded that the grievant would have to be placed on LTD beginning August 5, it determined that his planned return would not be possible. DRS believed that a hiring authorization from its Cabinet Secretary would be difficult to obtain, as the agency, along with the rest of state government, was trying to reduce its spending. Therefore, as a cost-savings measure, DRS management decided to leave the grievant's position vacant.

DRS management asserts that at the time, it had hoped to later fill the position, possibly with the grievant. However, once it was forced to make deeper financial cuts due to the Commonwealth's budget crisis, the facility's Executive Team decided to abolish the position entirely. The agency's Human Resources office further acknowledges that at no point prior to abolishing the position did the facility send an Agency Hiring Request to DRS Central Office, and ultimately to the Secretary, to fill the grievant's position.¹⁰

DISCUSSION

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.¹¹

Chief among the applicable policies in this case is the Virginia Sickness and Disability Program (VSDP), various aspects of which are governed by two state agencies, the Virginia Retirement System Board of Trustees (VRS) and the Department of Human Resource Management (DHRM).¹² VRS's VSDP Handbook for employees states that VSDP's ultimate goal "is to return you to gainful employment when you are medically able."¹³ The VSDP Handbook further states that the "VSDP encourages agencies to provide reasonable accommodations for disabled employees as long as it does not create an undue hardship for the agency [and] . . . will work with you and your licensed treating

¹⁰ During this Department's investigation, the facility's Human Resources Office noted that the facility's hiring manager wanted to return the grievant to work and had completed an Agency Hiring Request. However, the agency reported that the request never left the facility.

¹¹ Va. Code § 2.2-3004(A)(ii); *Grievance Procedure Manual* § 4.1(b)(1), page 10.

¹² As provided in VRS's Virginia Sickness and Disability Program Handbook, VRS "by law, has been given the authority to develop, implement and administer the VSDP. However, the authority granted is not intended to supercede the final authority of the Director of the Department of Human Resource Management to develop and interpret leave and related personnel policies and procedures associated with VSDP." VSDP Handbook 2002, "Authority and Interpretation," page 30.

¹³ VSDP Handbook 2002, "Objective of Program," page 4.

professional to coordinate your return to employment.”¹⁴ Moreover, the Handbook advises employees that during the course of their disability, "VSDP will call your licensed treating professional to obtain clinical information concerning your disability and to arrange a return-to-work plan for you when medically appropriate [and] . . . will be contacting your licensed treating professional, on an ongoing basis, to obtain updates on your diagnosis, symptoms, treatment plan and return-to-work plan."¹⁵ Therefore, while VSDP does not guarantee that agencies will hire employees back after a period of LTD,¹⁶ in accordance with VSDP's overriding mission, it would appear that agencies must not disregard VSDP's important goal of returning employees to work from periods of disability unless it would create an undue hardship for the agency.

Admittedly, the complexity of the VSDP made it difficult to determine what the status of the grievant could or should have been on his planned return date of August 5. Even DRS's human resources staff were unable to draw a conclusion about the grievant's status until the eleventh hour before his scheduled return to work. Given the circumstances of this case, however, it appears that DRS may have had at least four options: (1) it could have notified the grievant *earlier* of its conclusion regarding the LTD-Working rule so that he and his doctor could determine whether he would be able to work on August 1, if only for one hour, thus qualifying him for LTD-Working on August 5; (2) it could have accepted his job modifications and brought him back to work in an hourly capacity, with approval from the Secretary;¹⁷ (3) it could have waited until August 19 and, with the Secretary's approval, brought the grievant back from LTD when he would have been medically able to work full-time, full-duty; and (4) it could have explored the possibility of simply allowing him to return to work on August 5 as a full-time salaried employee (neither LTD, LTD-Working, or STD), and use his accumulated earned leave or leave without pay to make up for the two initial weeks of part-time work (20 hours per week) prior to working 40 hours per week on August 19.¹⁸ Further, while

¹⁴ VSDP Handbook 2002, "Long-Term Disability," page 11. The 2000 VSDP Handbook contains identical language. VSDP Handbook 2000, "Long Term Disability," page 11. Compare DHRM Policy 4.30 (Leave Policies – General Provisions) at III(C), page 2 of 5 ("[w]hen practicable, and for as long as the agency's operations are not affected adversely, an agency should attempt to approve an employee's request for leave of absence for the time requested by the employee").

¹⁵ VSDP Handbook 2002, "How do I access VSDP Benefits?" page 24.

¹⁶ VSDP Handbook 2002, "Long-Term Disability," page 10.

¹⁷ See VSDP FAQ'S for VSDP Coordinators and Human resources Departments, page 6.

¹⁸ EDR is unaware of any express policy provision(s) stating that an employee's lack of STD-Working (part-time) status on his 180th day of STD prohibits an agency from returning him to work on the next business day as a full-time salaried employee (in neither LTD, LTD-Working or STD status), and allowing him, just as it could allow any other full-time salaried employee, to use his accumulated earned leave or leave without pay to arrange for a two-week period of reduced working hours, assuming no undue hardship for the agency. Indeed, during the investigation for this ruling, the grievant asserts that as of August 5, he had earned and accumulated enough annual leave to cover any hours off from work during the initial two-week period of part-time work (August 5 through August 16), as his doctor had recommended, had the agency explored that option with him. This course of action would appear to be consistent not only with the intent of the VSDP, but also with its express provisions, which define "disability" as "[a] medical condition that is expected to keep the employee out of work for *more than* 20 work hours in a seven calendar day period." VSDP Handbook 2002, "Definitions and Terms," page 30. Under this definition, as of August 5, the grievant, whose doctor had released him to work for 20 hours per week for the following

agencies are not *required* to accept an employee's requested job restrictions, they are advised by DHRM that they may need to assess the accommodation under the Americans with Disabilities Act if the employee has a "disability" as defined by that Act.¹⁹

Here, it appears that DRS management was willing to accept the grievant's requested job modifications when it believed that he would be on LTD-Working status, only to refuse to accept the modifications upon concluding that the grievant would instead be placed on LTD, requiring an approved Agency Hiring Request from its Cabinet Secretary to bring him back. Understandably, the agency had the task of balancing competing interests: its interest in complying with the intent of the VSDP and related policies and its interest in agency cost-cutting and fiscal restraint. Nevertheless, this grievance raises a sufficient question as to whether DRS's actions with respect to the grievant's disability status and the abolition of his position were in disregard of the requirements and/or intent of applicable state policies, including, but not limited to, layoff and/or leave policies as well as the VSDP. Significantly, too, there is evidence in this case that the grievant had fulfilled his obligations under the VSDP to keep DRS management and the Third Party Administrator informed about his disability; there is also evidence that he did not receive timely, accurate information regarding the applicable rules from either.²⁰

CONCLUSION

For all the above reasons, this grievance qualifies for a hearing. For additional information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. Please note that this determination cannot be construed as a finding that the agency misapplied or unfairly applied policy, only that further review by an administrative hearing officer is warranted given the complexity of the facts and applicable policies in this case. If a hearing officer determines that DRC has misapplied or unfairly applied policy, he may only order that the agency reapply the policy as

two weeks, would not have been "out of work for more than 20 work hours in a seven calendar day period" and thus would not have had a "disability" on August 5 or afterwards as defined by the VSDP for purposes of implementing STD or LTD benefits.

¹⁹ See VSDP FAQ's for VSDP Coordinators and Human Resources Departments, page 4. Compare DHRM Policy 2.05 (Equal Employment Opportunity) and Executive Order 1 (2002) (prohibiting discrimination against otherwise qualified persons with disabilities and directing agency management to take affirmative measures to emphasize the recruitment of qualified disabled persons). It must be noted also that DRS has a "Reasonable Accommodation Policy." However, the agency notes that the policy was not mentioned to the grievant or utilized because it appeared that the grievant was due to return to work in the near future. See Agency Policy #25. This return never occurred. Moreover, after placing the grievant on LTD August 5, management took him off of LTD on August 31. Thus, the grievant was left with neither disability benefits nor a job.

²⁰ See VSDP Handbook, "Your Responsibilities as a VSDP Participant," page 22. The grievant appears to have maintained regular communication with his supervisor and with the Third Party Administrator while out on disability, and to have familiarized himself as well as possible with the VSDP handbook that was provided to him. Had DRS and/or the Administrator been able to advise the grievant on a timely basis of the outcome of his tentative August 5 return to work plan, this grievance may not have arisen.

mandated or in a manner in keeping with the intent of the applicable policy. A hearing officer may not order damages or attorney's fees, or any other prospective relief.²¹

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²¹ See *Grievance Procedure Manual* § 5.9(b), page 15.