Issue: Access/agency claims grievant had no access due to placement on long-term disability; Qualification/discrimination for disability; Ruling Date: April 9, 2004; Ruling #2004-564; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Grievant has access; issue not qualified for hearing

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS and QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation, and Substance abuse Services/ No. 2004-564
April 9, 2004

The grievant has requested a ruling on whether his December 10, 2003 grievance with the Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS or the agency) qualifies for a hearing. The agency failed to qualify the grievance claiming that the grievant did not have access to the grievance procedure because he was no longer an employee of the Commonwealth once he was placed on long-term disability (LTD).[1] The agency also claimed that there was no evidence that it misapplied policy by not returning him to his position once he was released for unrestricted duty. For the reasons set forth below, the grievant has access to the grievance procedure but his grievance does not qualify for hearing.

FACTS

The grievant was a Trade Technician III with DMHMRSAS. On or about June 2, 2002, the grievant was forced to stop working because of a back impairment.[2] The grievant was placed on Short-Term Disability (STD) under the Virginia Sickness and Disability Program (VSDP).[3] On or about December 3, 2003, the grievant presented his supervisor with a release to return to work slip from his treating physician. The supervisor purportedly stated that he was glad to have the grievant returning. Later that day, the grievant allegedly received a call from his facility's human resources department who informed him that he had been moved from STD to long-term disability (LTD).[4] The following day, December 4th, the grievant received a letter reiterating that he was

[1] The grievance procedure is available only to non-probationary classified state employees who are employed at the time that the grievance is initiated, unless the grievant is challenging a termination or involuntary separation. *Grievance Procedure Manual* § 2.3(2) and (3).
[2] The grievant asserts that the last day he worked was June 4, 2003.
[3] *See* Department of Human Resource Management (DHRM) Policy 4.57, "Virginia Sickness and Disability Program" and VSDP Handbook 2002. STD benefits provide income replacement for up to 180 calendar days and begin after a seven-calendar day waiting period. *See* VSDP Handbook 2002, "Short-Term Disability," page 7.
[4] Under the VSDP, LTD benefits begin at the conclusion of the 180 days of STD. VSDP Handbook 2002, "Long-Term Disability," page 10.

being placed in LTD. The agency has since informed the grievant that he will not be allowed to return to work as result of his being placed into LTD.

DISCUSSION

Access

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.[5] Under the grievance procedure, employees "must have been employed by the Commonwealth at the time the grievance is initiated (unless the action grieved is a termination or involuntary separation)."[6] The grievance procedure further states that if this criterion is not met, an agency may deny an employee access to the grievance procedure.[7] In this case, the grievant is challenging the agency's termination of his employment.

The Department of Human Resources Management (DHRM), the agency charged with implementation and interpretation of the Commonwealth's personnel policies, has stated that because an employee on LTD is not guaranteed reinstatement to his former position, it considers that employee "separated" from his position. As with any separated employee, an individual on LTD may use the grievance procedure to challenge his separation from state service, i.e., his placement into LTD, so long as he is not exempt from the Virginia Personnel Act (VPA) and was "a non-probationary employee of the Commonwealth at the time of the event that formed the basis of the dispute occurred." [8] In this case, the grievant was a non-probationary employee at the time he was moved into LTD (separated from employment) and he was not exempt from the VPA. Accordingly, he has access to the grievance procedure.

Qualification/ Unfair Application or Misapplication of Policy

The grievant claims that the management misapplied or unfairly applied policy, procedures, rules or regulations by not returning him to his Trade Technician III position once he was cleared by his physician for unrestricted duty. 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.

The Virginia Sickness and Disability Program

[5] Va. Code § 2.2-3001(A).
[6] *Grievance Procedure Manual* § 2.3, page 5.
[7] *Id.*
[8] *Id.*

Under the VSDP, employees are advised 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."[9] The VSDP Handbook further states that "[l]ong-term disability benefits begin at the conclusion of the 180 calendar days of short-term disability benefits."[10] Once an employee is moved into LTD, the Commonwealth's VSDP administrator attempts to return the employee to work.[11] However, as discussed above, 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. More importantly, the facts are not disputed that the grievant was not cleared for work until after the 180-calendar day period expired.[12] Accordingly, the grievant has not presented evidence that the agency misapplied the VSDP policy when it moved the grievant into LTD, thus separating his employment. Nor does it appear that DOC misapplied policy when it failed to return the grievant to work. The VSDP Handbook states that once an employee moves from STD to LTD, "[r]eturn to [his] pre-disability position is not guaranteed."[13] In sum, there is no evidence that the agency violated any mandatory VSDP provisions.

Given the particular facts of this case, this Department likewise cannot conclude that the agency's actions constituted an unfair application of policy. The grievant missed work from February 15, 2001 through April 29, 2001; February 14, 2002 through June 16, 2002; July 19, 2002 through October 27, 2002; December 6, 2002 through February 9, 2003; and June 3, 2003 through November 29, 2003. During the course of the investigation into the facts surrounding this grievance, the agency explained that based on the grievant's multiple and extended absences from work, it elected not to hold the grievant's position open for his return. Given the extensive number and duration of the grievant's absences, this Department cannot conclude that the agency's actions were so unfair as to amount to a disregard of the intent of VSDP policy. As a discussed in the following section, management must be able to rely on upon its employees to regularly show up for work. If an employee is habitually absent from work, even for a legitimate reason such as chronic illness, it is not unfair for management to replace that individual with one who can and will regularly attend work.

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[9] VSDP Handbook 2002, "Short-Term Disability," page 7.
[10] *Id*., "Long-Term Disability," page 10.
[11] *Id*., "Long-Term Disability," page 11. However, nothing in the VSDP Handbook guarantees that an employee will be returned to the same position or the same agency. Placement options for employees receiving LTD benefits include return to the same or different job in the same or different agency or in a non-state position. *Id*.
[12] The grievant contends that his last day of work was June 4, 2003, whereas the agency asserts that the last day was June 2, 2003. The grievant asserts that he presented a release to work to the agency on December 3, 2003. Assuming without deciding that the grievant is correct that June 4th was his last day of work, December 3rd would have been the 181st day since he last worked.
[13] *Id*., "Long-Term Disability," page 10.

The Equal Employment Opportunity Policy

DHRM Policy 2.05 "[p]rovides that all aspects of human resource management be conducted without regard to race, color, religion, gender, age, national origin, *disability*, or political affiliation . . . ."[14] Under Policy 2.05 "'disability' is defined in accordance with the Americans with Disabilities Act."[15]

The relevant law governing disability accommodations is the Americans with Disabilities Act (ADA).[16] The ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability. A qualified individual is defined as an individual with a disability, who, with or without "reasonable accommodation," can perform the essential functions of the job.[17] The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires."[18] Courts have recognized that an accommodation is unreasonable if it requires the elimination of an "essential function."[19]

In this case, it would appear that the agency determined that grievant's multiple and extended absences from work precluded the grievant from performing the essential functions of his position. Courts recognize that "a regular and reliable level of attendance is an essential function of one's job."[20] Even if the grievant were "disabled" for purposes of the ADA, based on his repeated stretches of absences, it would appear that the agency's actions did not violate either the ADA or, consequently, DHRM Policy 2.05. Accordingly, the issue of misapplication or unfair application of the Equal Employment Opportunity is not qualified for hearing.[21]

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[14] DHRM Policy 2.05, page 1 of 4 (emphasis added).
[15] *Id*.
[16] 42 U.S.C. §§12101 *et seq.*
[17] In defining whom the ADA covers and the duties of the employer, the Act does not distinguish between those persons whose disability came about due to a work-related injury versus other disabled individuals.
[18] Courts have considered a number of factors in determining what functions are essential. These factors include, but are not limited to, the employer's judgment regarding which functions are essential, the number of employees available among whom the performance of the functions can be distributed, the amount of time spent performing the functions, the consequences of not performing the function, and the actual work experience of past or current incumbents in the same or similar jobs. *See* 42 U.S.C. 12111(8); 29 C.F.R. 1630.2(n); Hill v. Harper, 6 F. Supp.2d 540, 543 (E.D. Va. 1998).
[19] Hill v. Harper, 6 F. Supp.2d 540, 543 (E.D.Va. 1998)(citing Hall v. U.S. Postal Service, 857 F.2d 1073, 1078 (6th Cir. 1988)).
[20] Lamb v. Qualex, Inc. 2002 U.S. App. LEXIS 5982, 20-21, 33 Fed. Appx. 49, 56-57 (4th Cir. 2002)(unpublished decision) citing to Halperin v. Abacus Tech Corp., 128 F.3d 191, 199 (4th Cir. 1997), abrogated on other ground by Baird ex rel. Baird v. Rose, 192 F.3d 462 (4th Cir. 1999); Tyndall, 31 F.3d at 213. Indeed, an employee "who does not come to work cannot perform any of his job functions, essential or otherwise." Tyndall, 31 F.3d at 213 (quoting Wimbley v. Bolger, 642 F. Supp. 481, 485 (W.D. Tenn. 1986), aff'd, 831 F.2d 298 (6th Cir. 1987)). An employee who cannot meet the attendance requirements of the job at issue cannot be considered a "qualified" individual protected by the ADA. Tyndall, 31 F.3d at 213.
[21] To the extent this grievance challenges the denial of Workers' Compensation benefits, we note that the grievant is contesting that denial through another state process, the Commonwealth's Workers'

APPEAL RIGHTS AND OTHER INFORMATION

For more information regarding actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification 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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Claudia T. Farr
Director

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William G. Anderson, Jr.
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Compensation statutes, and thus the benefits denial itself cannot be addressed through the grievance procedure. *Grievance Procedure Manual* § 2.4 page 7. *See also* EDR Ruling #2002-059.