

Issue: Access/employee on Long Term Disability-agency asks for ruling on access; Compliance/30-day rule; Qualification/Discrimination for disability; Ruling Date: November 19, 2003; Ruling #2003-137; Agency: Department of Corrections; Outcome: Access/employee has access; Compliance/ grievance is timely; Qualification/not qualified (keywords ADA, short-term disability, long-term disability). Appealed: Decision: reversed decision on misapplication of policy or unfair application of state policy (VSDP)



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**ACCESS, COMPLIANCE, AND QUALIFICATION RULING OF  
DIRECTOR**

In the matter of Department of Corrections/ No. 2003-137  
November 19, 2003

The grievant has requested a ruling on whether his June 5, 2003 grievance with the Department of Corrections (DOC) qualifies for a hearing. DOC 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).<sup>1</sup> The agency also claimed that the grievance was untimely. For the reasons set forth below, the grievance is not qualified for hearing.

**FACTS**

The grievant was a Corrections Officer with DOC. On September 2, 2002, the grievant suffered an injury on the job that required hip surgery. On September 9, 2002, the grievant was placed on Short-Term Disability (STD) under the Virginia Sickness and Disability Program (VSDP).<sup>2</sup> On March 2, 2003, the agency moved the grievant from STD to long-term disability (LTD) and notified the grievant by letter on March 12.<sup>3</sup>

On June 2, 2003, the grievant's physician released the grievant to return to work. When the grievant notified DOC of his intent to return to work, Human Resources informed him that he was no longer an employee of the agency. On June 5, 2003, the grievant initiated a grievance, challenging DOC's failure to return him to his pre-disability position. The agency claims that the grievant was separated from state employment when he was placed on LTD on March 2. As such, the agency did not

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<sup>1</sup> 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).

<sup>2</sup> 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.

<sup>3</sup> Under the VSDP, LTD benefits begin at the conclusion of the 180 days of STD. VSDP Handbook 2002, "Long-Term Disability," page 10.

qualify the grievance for hearing, claiming that (1) the grievant did not have access to file a grievance because he was no longer an employee when he initiated it, and (2) the grievant failed to challenge his separation within 30 calendar days as required by the grievance procedure.<sup>4</sup> Agency management has stated, however, that if the grievant is able to return to full-time, full-duty employment as a Corrections Officer, he may reapply for the position as vacancies occur.<sup>5</sup>

## DISCUSSION

### *Access*

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.<sup>6</sup> 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).”<sup>7</sup> The grievance procedure further states that if this criterion is not met, an agency may deny an employee access to the grievance procedure.<sup>8</sup> 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.”<sup>12</sup> 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.

### *Timeliness of the Grievance (Compliance)*

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he knew or should have known of the event

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<sup>4</sup> See *Grievance Procedure Manual* § 2.4(1), page 6.

<sup>5</sup> See Second Resolution Step Response, dated June 12, 2003.

<sup>6</sup> Va. Code § 2.2-3001(A).

<sup>7</sup> *Grievance Procedure Manual* § 2.3, page 5.

<sup>8</sup> *Id.*

<sup>12</sup> *Id.*

or action that is the basis of the grievance.<sup>13</sup> When an employee initiates a grievance beyond the 30-calendar day period without just cause, the grievance is not in compliance with the grievance procedure, and may be administratively closed.

In this case, the event that forms the basis of his grievance is the grievant's separation from employment, which occurred when he was moved into LTD. However, while the grievant *may* have known, on or about March 24, 2003,<sup>14</sup> that he had been moved into LTD, he first learned that he had been separated from employment on June 2, 2003, when he attempted to return to work after being released by his physician. At that time he was informed that he was no longer an employee. Accordingly, the grievance was initiated within 30-calendar days of when the grievant knew or should have known of the event that formed the basis of the grievance, and is thus timely.<sup>15</sup>

#### *Qualification/ Unfair Application or Misapplication of Policy*

Though raising legal issues ("unlawful termination"),<sup>16</sup> the grievant's Form A also makes out claims of misapplication/unfair application of state policy.<sup>17</sup> 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*

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."<sup>18</sup> The VSDP Handbook further states that "[l]ong-term disability benefits begin

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<sup>13</sup> Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4(1), page 6.

<sup>14</sup> Someone with the same last name as the Grievant signed for a letter from the agency on March 24, 2003, which informed the grievant that he was being placed on LTD.

<sup>15</sup> While the grievant was informed on March 12, 2003, that he had been placed on LTD, he had no notice that he had been separated from employment. Agencies are encouraged to inform employees who are moved into LTD whether their jobs are being held. *See* VSDP FAQ'S for VSDP Coordinators and Human Resources Departments, page 5. In this case, the grievant was not given any information on the status of his position. Had the grievant been informed that his job was not being held open, arguably, the grievant would have had at least some notice that he no longer had an expectation of employment. Without this information, however, it would appear unfair to charge the grievant with knowledge that movement into LTD is tantamount to separation. This is particularly true given that the agency charged with the promulgation and interpretation of state policy, the Department of Human Resource Management (DHRM), has only recently definitively opined that movement into LTD constitutes separation from employment.

<sup>16</sup> Grievances based solely on legal issues do not qualify for hearing. *See* EDR Ruling 2002-145.

<sup>17</sup> As discussed below, the Virginia Sickness and Disability Program (VSDP) and Equal Employment Opportunity policies are implicated here.

<sup>18</sup> VSDP Handbook 2002, "Short-Term Disability," page 7.

at the conclusion of the 180 calendar days of short-term disability benefits.”<sup>19</sup> Once an employee is moved into LTD, the Commonwealth’s VSDP administrator attempts to return the employee to work.<sup>20</sup> 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. Accordingly, the grievant has not presented evidence that the agency misapplied or unfairly applied the VSDP policy when it moved the grievant into LTD, thus separating his employment. Nor does it appear that DOC misapplied or unfairly applied policy when it failed to return the grievant to work on June 2. The VSDP Handbook states that once an employee moves from STD to LTD, “[r]eturn to [his] pre-disability position is not guaranteed.”<sup>21</sup> Accordingly, this issue does not qualify for a hearing.

### *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 . . . .”<sup>22</sup> Under Policy 2.05 “‘disability’ is defined in accordance with the Americans with Disabilities Act.”<sup>23</sup>

The relevant law governing disability accommodations is the Americans with Disabilities Act (ADA).<sup>24</sup> 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.<sup>25</sup> The “essential functions” are the “fundamental job duties of the employment position the individual with a disability holds or desires.”<sup>26</sup> Courts have recognized that an accommodation is unreasonable if it requires the elimination of an “essential function.”<sup>27</sup>

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<sup>19</sup> *Id.*, “Long-Term Disability,” page 10.

<sup>20</sup> *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.*

<sup>21</sup> *Id.*, “Long-Term Disability,” page 10.

<sup>22</sup> DHRM Polcy 2.05, page 1 of 4 (emphasis added).

<sup>23</sup> *Id.*

<sup>24</sup> 42 U.S.C. §§12101 *et seq.*

<sup>25</sup> 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.

<sup>26</sup> 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).

<sup>27</sup> *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 (6<sup>th</sup> Cir. 1988)).

Under the ADA, a reasonable accommodation can be a re-assignment to a vacant position when a disabled employee cannot be reasonably accommodated in his position, including reassignment to a lower grade position if necessary.<sup>28</sup>

A threshold question is whether an employee has a disability as defined by the ADA. The ADA defines a 'disability' as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."<sup>29</sup> Presumably the grievant's hip injury qualifies as physical impairment. However, assuming without deciding that 'working' is a major life activity under the ADA,<sup>30</sup> the grievant has not presented evidence that his injury is "substantially limiting."

In order to demonstrate that an impairment is substantially limiting, an individual must show that he is significantly restricted in a major life activity.<sup>31</sup> In determining whether an impairment is substantially limiting, courts may consider the "nature and severity of the impairment," the "duration or expected duration of the impairment," and the "permanent or long term impact" of the impairment.<sup>32</sup> These factors indicate that a temporary impairment, such as recuperation from surgery, will generally not qualify as a disability under the ADA.<sup>33</sup> In this case, grievant suffered a hip injury that required surgery and a recovery period of nine months, after which he was released to return to work. Accordingly, there is no evidence that the grievant suffered a "substantially limiting impairment" as a result of his hip injury. As evidenced by his eventual release to return to work, the grievant's injury was of a limited duration and did not appear to have a permanent impact. Thus, it does not appear that the grievant is disabled as defined by the ADA. His grievance is therefore not qualified for hearing.

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<sup>28</sup> *Williams v. Channel Master Satellite Systems, Inc., Petty v. Freightliner Corp.*, 113 F. Supp. 2d 808, 810 (W.D. N.C. 2000); *see also Bratten v. SSI Services, Inc.*, 185 F.3d 625, 633-634 (6<sup>th</sup> Cir. 1999) (discussing Fourth Circuit position).

<sup>29</sup> 42 U.S.C. § 12102(2).

<sup>30</sup> The U.S. Supreme Court has noted "the conceptual difficulties inherent in the argument that working could be a major life activity," but declined to "decide this difficult question." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 692, (2002). This question is likewise not necessary to the resolution of this case.

<sup>31</sup> *Pollard v. High's of Baltimore, Inc.* 281 F.3d 462, 467 (4<sup>th</sup> Cir. 2002); 29 C.F.R. § 1630.2(j)(1).

<sup>32</sup> *Pollard*, 281 F. 3d at 467-468; 29 C.F.R. § 1630.2(j)(2).

<sup>33</sup> *Pollard*, 281 F. 3d at 468. "An impairment simply cannot be a substantial limitation on a major life activity if it is expected to improve in a relatively short period of time." *Id.* The *Pollard* court noted, citing an earlier decision, that "it is evident that the term 'disability' does not include temporary medical conditions, even if those conditions require extended leaves of absence from work." *Pollard* at 468, 281 F. 3d (citing *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 199 (4<sup>th</sup> Cir. 1997)). In *Pollard*, where the plaintiff "was left with only the restrictions that she not lift more than twenty-five pounds or bend repetitively," the Court held that a "nine-month absence is insufficient to demonstrate that *Pollard* had a permanent or long-term impairment that significantly restricted a major life activity." *Pollard*, 281 F. 3d at 469-471.

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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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Director

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