Issue: Qualification/EEO policy, disability, misapplication of VSDP Policy; Compliance/clarifying of grievance by grievant; Ruling Date: December 2, 2004; Ruling #2004-879; Agency: Department of Corrections; Outcome: qualified for hearing, grievant in compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2004-879
December 2, 2004

The grievant has requested qualification of her March 11, 2003 grievance[1] with the Virginia Department of Corrections (DOC or the agency). The grievant essentially asserts that the agency placed her into a position knowing that she might further injure herself. The grievant also asserts that when it became apparent that she could no longer perform the essential functions of her job, the agency did not attempt to place her into any other position for which she was minimally qualified. For the reasons set forth below, this grievance qualifies for hearing.

FACTS

The grievant was employed as a Postal Assistant at a DOC facility. She previously had been employed with the facility in another position, but when that position was abolished, management transferred her to the Postal Department in early 2002. Because of a disability, the grievant was provided accommodation by the agency to assist her in the performance of the essential functions of her job.[2]

In December 2002, the grievant presented management with medical documentation stating she could no longer perform tasks requiring prolonged bending and twisting. On December 11, 2002, the agency informed the grievant that management was unable to reasonably accommodate this request in any manner that would permit her to continue in this position. At that time, they also advised the grievant that she would be carried on Short Term Disability (STD) as approved by CORE[3] for a period up to 180 calendar days, and when STD expired, CORE would determine whether she met the requirements for Long Term Disability (LTD).

The grievant states that she inquired about a position in the Medical Department of the facility on October 29, 2002, but was advised that the position was already filled. Furthermore, she believes that the facility filled two positions in January and February of

[1] The grievance was dated March 10, 2003, but was received by management on March 11, 2003.
[2] The agency modified a vehicle for the grievant's use and arranged with the local post office to limit the weight of the mailbags.
[3] CORE is the Commonwealth's third party administrator of the Virginia Sickness and Disability Plan (VSDP).

2003 for which she may have been qualified. On February 11, 2003, the grievant was placed on LTD.

The grievant initiated her grievance on March 11, 2003. The agency maintained that the grievant did not have access to the grievance procedure at the time of the initiation of the grievance because she had been placed on long term disability and, even if she did have access, the grievance was not timely filed.

On October 6, 2003, this Department held that the grievant had access to the grievance procedure and that her challenge to being placed into long term disability was timely.[4] The grievance proceeded through the management resolution steps and on September 9, 2004, the grievant requested that this Department qualify her grievance for hearing.

DISCUSSION

QUALIFICATION:

The Equal Employment Opportunity (EEO) Policy

While the grievant does not expressly couch her grievance in terms of disability discrimination, she asserts that the agency failed to place her in an alternative position once it was evident that she could no longer perform her mailroom duties due to the worsening of her health. The Commonwealth's 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 . . . ."[5] Thus, fairly read, the Grievance Form A appears to make out a claim of misapplication of the state's EEO 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.[6]

Under Policy 2.05, "'disability' is defined in accordance with the Americans with Disabilities Act," the relevant law governing disability accommodations.[7] Like Policy 2.05, the Americans with Disabilities Act (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 a person with a disability,

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[4] The ruling explained, however, that as to the several positions of which the grievant was aware that may have served as suitable alternative placement positions, her grievance was not timely. *See* EDR Ruling 2003-070.
[5] The Department of Human Resources Management DHRM Policy 2.05, page 1 of 4 (emphasis added).
[6] Va. Code § 2.2-3004(A)(ii); *Grievance Procedure Manual* § 4.1(b)(1).
[7] 42 U.S.C. §§12101 *et seq.*

who, with or without "reasonable accommodation," can perform the essential functions of the job.[8] An individual is "disabled" if she "(A) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment."[9] The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires."[10]

I. Was the Grievant Disabled?

The initial inquiry is whether the grievant has a physical or mental impairment that substantially limits one or more of her major life activities. The grievant has presented evidence of a physical impairment from her health care provider. Thus, for purposes of this ruling only, we assume that the grievant has a physical impairment.

The next question is whether her impairment substantially limits a major life activity. To be "substantially limited" in a major life activity, the plaintiff must be significantly restricted in performing the activity.[11] In this case, the grievant is apparently restricted to some degree in the major life activities of walking, standing, and working. She continues to receive physical therapy and claims that she cannot stand for extended periods of time. She has been using two canes to assist her with walking but is attempting to progress to the point where one will suffice. In addition, she has not worked since she was moved into long term disability although she says that she would like to try.

In some cases, it may be readily apparent that an employee's impairment does not substantially limit a major life activity. In this particular case, however, the question of whether the grievant is substantially limited is a question of fact best determined by a hearing officer at hearing. Here, it would appear that the grievant's impairment is relatively significant although the complete extent of the grievant's impairment and the impact of that impairment on her daily life activities is not fully evident. In sum, a hearing officer is generally better situated to determine whether the grievant is in fact "disabled" where it seems apparent that the impairment is likely permanent, seemingly substantial, and evidently effects one or more major life activities.

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[8] In defining whom the ADA covers and the duties of the employer, the Act does not distinguish between those persons whose disability resulted from a work-related injury versus other disabled individuals.

[9] 42 U.S.C. § 12102(2).

[10] 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). Courts have recognized that an accommodation is unreasonable if it requires the elimination of an "essential function." 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)).

[11] Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 196-97, 122 S. Ct. 681, 691 (2002).

II. Did the Agency Reasonably Accommodate the Grievant?

If an employee is disabled under the ADA, an employer must make "reasonable accommodations" unless the employer can demonstrate that the accommodation "would impose an undue hardship on the operation of the business [or government]."[12] In this case, the agency appeared to attempt to accommodate the grievant, at least initially. When the grievant was working in the mailroom, the agency installed running boards on the van that she used to deliver mail. In addition, the agency contacted the U.S. Post Office and convinced the Post Office to reduce the weight of the mailbags coming into the facility. However, once the grievant was placed on additional restrictions (regarding twisting and bending) the agency indicated on December 11, 2002 that it had "no other option to offer [the grievant] which would allow [her] to perform the essential functions of [her] job."

It should be noted that under the ADA "reassignment to a vacant position" is considered a reasonable accommodation.[13] In this case, there is no evidence that the agency made any attempt to place the grievant in other vacant positions between December 11, 2002 and February 11, 2003 (when the grievant was finally placed on long term disability). To the contrary, it seems that the determination that she would not be placed elsewhere was apparently a foregone conclusion. On December 11, 2002, the agency informed the Grievant that:

> You will be carried on Short Term Disability as it is approved by CORE. The maximum period of short term disability is 180 calendar days. At the expiration of short term disability, if approved by CORE, you will go into long term disability. . . . *As you will not be returning at the expiration of your short term disability*, you should return state property in your possession such as identification cards, chits, etc. as soon as possible, you final check will be held pending return of the same.[14]

Because the agency apparently made no attempt to place the grievant in a vacant position, the issue of misapplication of the EEO Policy, 2.05, is qualified for hearing for a determination of whether the agency sufficiently attempted to accommodate the grievant's potential disability.[15]

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[12] 42 U.S.C. § 12112(b)(5)(A).
[13] 42 U.S.C. § 12111(9)(B). (However, employers are not required to create new jobs or reassign disabled employees if no positions are vacant).
[14] December 11, 2002, letter from the Warden to the Grievant, (emphasis added).
[15] This Department expresses no opinion as to whether the agency is bound by the ADA to attempt to place the grievant within other state agencies. It should be noted that if there were no vacant, funded positions whose essential functions the grievant was capable of performing, the agency could potentially escape liability under the ADA. *See* Shapiro v. Township of Lakewood, 292 F.3d 356 (3rd Cir. 2002).

Misapplication of VSDP Policy

The other policy implicated in this grievance is the Virginia Sickness and Disability Program (VSDP), various aspects of which are governed by two state agencies, the Virginia Retirement System (VRS) Board of Trustees and the Department of Human Resource Management (DHRM).[16] VRS's VSDP Handbook for employees states that VSDP's ultimate goal "is to return you to gainful employment when you are medically able."[17] The VSDP Handbook further states that "The first priority is to return you to your same job and agency; however, this may not always be possible. *In all cases*, VSDP will attempt to return you to work."[18] 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."[19] Thus, it would appear that agencies must not disregard VSDP's stated important goal of returning employees to work from periods of disability unless it would create an undue hardship for the agency.

During the course of the investigation for this ruling, EDR sought clarification of an agency's obligations under VSDP. This Department posed to a DHRM Policy Analyst the question of whether the agency has any obligation to try to place an employee in a vacant position once the employee presents documentation indicating that restrictions are permanent and he/she will not be able to return to his/her original position. DHRM, in turn, passed the question along to VRS.[20] In response, a VRS employee charged with VSDP responsibilities opined that: "We do not have any requirements that the agencies must return employees back to work but as you know we encourage them to do so."[21] In reply to the above statement, another VRS employee with VSDP responsibilities noted that:

> The Work Force Commission and the General Assembly *intended* that the program would provide income protection during periods of disability and that employers would be encouraged to take employees back into their

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[16] 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.
[17] VSDP Handbook 2002, "Objective of Program," page 4.
[18] VSDP Handbook 2002, "Short-Term Disability," page 8, (emphasis added).
[19] VSDP Handbook 2002, "How do I access VSDP Benefits?" page 24.
[20] Va. Code § 2.2-1201(13) states that the DHRM Director shall "Develop state personnel policies and, after approval by the Governor, disseminate and interpret state personnel policies and procedures to all agencies." Section 2.2-1201(13) further states that "The [DHRM] Director of the Department shall have the final authority to establish and interpret personnel policies and procedures and shall have the authority to ensure full compliance with such policies." *See also* Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).
[21] November 19, 2004, 2:51 p.m. e-mail.

> workforce when the employee was medically able to return with accommodation if necessary. The reasoning was that employers would through their acceptance to bring employees back show that the knowledge, skills and abilities of the employee are valued.
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> Because the agencies were required to have return to work program for occupational disabilities *it was assumed that these same programs would be used to bring employees back who had non occupational disabilities under VSDP*. Unfortunately, most agencies have chosen to selectively extend the return to work incentives to the non occupational disability cases under VSDP.[22]

As noted above, 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.* Here, there remains a question of whether the agency's failure to attempt to place the grievant in a vacant, funded position is tantamount to a disregard of the intent of the VSDP policy. Moreover, given that this grievance has been qualified on the issue of misapplication/unfair application of the EEO policy, it simply makes sense to send the issue of misapplication/unfair application of the VSDP policy to hearing as well for a more full exploration of the facts and applicable policies.

COMPLIANCE:

In September of 2004, the grievant sent a letter to the agency's Human Resources Department with a subject heading of "Amend My Grievance" in which she sought to "clarify/state" that policy was misapplied by the agency. The agency objects to the grievant's attempt to amend her grievance.

Under the grievance procedure, "[o]nce a grievance is initiated, additional claims may not be added."[23] In the case, however, the grievant does not appear to be attempting to expand her grievance but is instead merely clarifying it. The 'amendment' simply states that which is reasonably inferred from the original grievance: that despite the absence of any specific reference to a particular policy, the agency's purported actions (and/or inactions) constituted misapplication or unfair application of the EEO and VSDP policies.[24] Thus, under the facts of this case, the grievant's attempt to clarify her grievance did not violate the grievance procedure.

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[22] November 19, 2004, 4:02 p.m. e-mail, (emphasis added).
[23] *Grievance Procedure Manual,* § 2.4.
[24] The grievant asserts in her Grievance Form A and attachment that the agency "gave me a job knowing that I had disabilities and that the possibility existed that I could further injure myself" and that she was placed in the position that would possibly cause injury "due to my disability." She further states that when "[o]ther jobs became available they refused to offer me one but selected to fill them with other employees."

A final note: the Grievance Form A asserts that the agency placed the grievant into a position (the mailroom) which it knew would cause her injury. It would appear that the grievant provided this statement as background information rather than as a separate issue for which she might obtain relief. To the extent that the grievant intended this claim to be an independent issue for which she could gain relief, it is untimely because the grievant's transfer to the mailroom and her entire tenure there occurred more than 30 calendar days prior to the initiation of her grievance.[25] The grievant is not, however, precluded from presenting evidence at hearing relating to the issue of her placement in the mailroom if it relates to the qualified issues.[26] The hearing officer will determine the relevance and admissibility of such evidence at hearing.

This Department's rulings on matters of compliance are final and nonappealable and have no bearing on the substantive merits of a grievance.[27]

CONCLUSION

For the reasons discussed above, this Department qualifies the grievance for hearing. This qualification ruling in no way determines that the agency's actions were discriminatory or constituted a misapplication or unfair application of policy, only that further exploration of the facts by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B. For additional information, please refer to the enclosed sheet.

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Claudia T. Farr
Director

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William G. Anderson, Jr.
EDR Consultant, Sr.

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[25] *See Grievance Procedure Manual* § 2.4, "An employee's grievance must be presented to management within 30 calendar days of the date the employee knew or should have known of the event that forms the basis of the grievance."

[26] Likewise, while the grievant may not be granted relief for the agency's purported failure to place her in the positions referenced in ruling 2003-070 (where this department found that claims based on several specific vacancies were untimely), the grievant may nevertheless introduce evidence pertaining to these positions as background evidence.

[27] Va. Code § 2.2-1001(5).