

Issue: Compliance/administrative review of hearing decision based on claim of the hearing officer decided on issues not qualified for hearing and failure to give appropriate level of deference to actions by agency management; Ruling Date: November 5, 2004; Ruling 2004-897; Outcome: hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Health
Ruling Number 2004-897
November 5, 2004

Through its legal counsel, the Department of Health (VDH or agency) has requested that this Department administratively review the hearing officer's decision in Case Number 855. The agency claims that (1) the hearing officer decided issues not qualified for hearing; and (2) failed to give an appropriate level of deference to actions by agency management. For the reasons discussed below, this Department concludes that the hearing officer did not violate the grievance procedure.

FACTS

The grievant was employed as an Office Service Specialist at a county VDH facility. She had been employed by VDH for over 28 years and was covered by the Commonwealth's Virginia Sickness and Disability Program (VSDP).

In December of 2002, the grievant began suffering back pain. She was placed on Short Term Disability (STD) on December 18, 2002. (This date was subsequently changed to December 19, 2002, and again to December 30, 2002.) The grievant received STD benefits and returned to work on or about April 9, 2003 for regular duty but with a reduced schedule of four hours per day.

On or about June 16, 2003, the grievant's health care provider wrote a note stating that the grievant could return to work on June 17th 2003 for light duty and should be granted a five-minute break each hour. The medical provider issued a second note on June 16th which eliminated the break restriction and indicated that the grievant had a follow-up medical appointment on July 1, 2003.

On June 25, 2003, the day the agency first asserted that the grievant moved into Long Term Disability (LTD), the grievant was sent home. She was told that the agency would no longer accommodate her request for an accommodation (the 5-minute break each hour.) On Friday, June 27, 2003, the grievant saw her doctor, who provided her

with a release to work full-duty with no restrictions as of the next workday, Monday, June 30th.

On Saturday, June 28th, the agency again asserted that the grievant moved into LTD, this time based on the grievant's amended STD start date. On Monday, June 30th, when the grievant attempted to return to work, she was told that she had been separated from state service as of June 28th when she moved into LTD. She was further advised that because her doctor had released her to work without restrictions as of June 30th, she was no longer eligible for continued LTD benefits. Thus, she lost both her job and LTD benefits as a result of being moved into LTD status on Saturday, June 28th, and being cleared for unrestricted work on Monday, June 30th.

On July 21, 2003, the grievant timely challenged her separation from state employment alleging that the agency had discriminated against her based on her age and disability. She also claimed that the agency had "misapplied the policy regarding short-term disability and long-term disability." The agency denied qualification of the grievance for a hearing. The grievant then sought qualification from this Department (EDR). On March 26, 2004, the EDR Director issued qualification ruling denying qualification for hearing, based, in part, on a Department of Human Resources Management (DHRM) Policy Analyst interpretation of the VSDP policy.¹

The grievant appealed the EDR Director's decision to the Circuit Court in the jurisdiction where the grievance arose. On August 2, 2004, the Circuit Court ordered the qualification of the grievance on the issue of whether the Agency "may have misapplied or unfairly applied state policy when the [Grievant] was placed on long-term disability on June 28, 2003."²

On August 19, 2004, EDR assigned the single issue of misapplication or unfair application of policy to a hearing officer. On September 17, 2004, a hearing was held at the agency's regional office. In his hearing decision, the hearing officer found that the agency misapplied state policy when it removed grievant from employment. The hearing officer ordered the agency to reinstate the grievant to an objectively similar position. Specifically, the hearing officer held that the agency misapplied DHRM policy 4.57 by: (1) treating as disabled an employee who was not longer disabled; (2) placing the grievant on STD instead of STD-Working status; (3) not considering whether grievant should be placed on LTD-Working status prior to sending her home; and (4) not attempting to determine whether grievant's medical restrictions could be accommodated.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final

¹ See EDR Ruling #2003-487.

² The age and disability discrimination claims were rejected by the Circuit Court for the reasons set forth in EDR Ruling #2003-487.

decisions...on all matters related to procedural compliance with the grievance procedure.”³ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁴

Scope of the Hearing Officer’s Authority

The agency claims that the hearing officer “exceeded the scope of his authority by ruling that the Agency violated both DHRM Policy 4.57 and the Commonwealth’s STD policy.” Under the grievance procedure, only issues qualified by the EDR Director or the Circuit Court may be decided by the hearing officer.⁵ The circuit court qualified the issue of whether the agency “may have misapplied or unfairly applied state policy when the [Grievant] was placed on long-term disability on June 28, 2003.” As explained below, contrary to the agency’s assertion, each of the four specific misapplications (or unfair applications) of state policy⁶ cited by the hearing officer have a direct bearing on the agency action of moving the grievant into LTD on June 28th.

There can be little doubt that the hearing officer was well within the scope of his authority when he addressed the relationship between the grievant’s physical condition and her removal under VSDP Policy. The hearing officer found that the agency had treated the grievant as disabled when she was not. It would appear that the agency could move the grievant into LTD *only* because the grievant was viewed as disabled and purportedly in need of an accommodation.⁷ Accordingly, the hearing officer’s examination of the physical condition of the grievant at the moment she was moved into LTD on June 28th is directly related to the issue qualified for the hearing.

The hearing officer also found that the agency misapplied or unfairly applied policy when it placed the grievant on Short Term Disability (STD) instead of STD-Working. This purported misapplication (or unfair application of policy) arguably first occurred well prior to June 28, 2003. Nevertheless, this ‘misapplication’ arguably continued until the day she was separated from state service on June 28th. In essence, this alleged misapplication could reasonably be viewed as a continuing violation. Moreover, the grievant’s short-term status (STD or STD-Working) appears to have a direct bearing on whether the grievant was improperly separated from employment on June 28th. The *VSDP FAQ’s for VSDP Coordinators and Human Resource Departments*

³ Va. Code § 2.2-1001(2), (3), and (5).

⁴ See *Grievance Procedure Manual* § 6.4(3).

⁵ *Rules for Conducting Grievance Hearings*, § I.

⁶ VSDP is a relatively complex policy discussed in a number of documents including *DHRM Policy 4.57 Virginia Sickness and Disability Program*, *Virginia Sickness and Disability Program Handbook*, *VSDP Employer Manual*, and *VSDP FAQ’s for VSDP Coordinators and Human Resource Departments*.

⁷ If the grievant was not disabled and in need of an accommodation, then it would seem inappropriate to place her into LTD. “If the employee is released with restrictions to work a full schedule, and if the restrictions do not affect the essential job functions, as determined by the agency, then CORE will close the STD claim and consider the employee returned to work full-time/full duty.” *VSDP FAQ’s for VSDP Coordinators and Human Resource Departments*, pg. 2.

indicates that “[i]n order for an employee to go into LTD-working status he/she must be in an STD-Working status on the 180th day of the waiting period.”⁸ The *VSDP FAQ* further states that the “If the employee was not in STD working on the 180th calendar day, or if the agency cannot continue to accommodate restrictions, the employee will be placed in LTD status.”⁹ Thus, the issue of grievant’s appropriate ‘short-term’ status at the time she was moved into LTD on June 28th is directly related to the issue qualified by the Circuit Court.

The hearing officer found that the agency never attempted to determine whether the grievant’s medical restrictions could be accommodated. This conclusion is also directly related to issue qualified by the Circuit Court. The hearing decision notes that policy states that the agency shall determine if “restrictions *can* be accommodated.”¹⁰ (Such a determination would appear to be critical because according to *VSDP FAQ’s for VSDP Coordinators and Human Resource Departments*, “[i]f the employee is released with restrictions to work a full schedule, and if the restrictions do not affect the essential job functions, as determined by the agency, then CORE will close the STD claim and consider the employee returned to work full-time/full-duty.”)¹¹ Thus, the hearing officer’s examination of the agency’s apparent refusal to consider the requested accommodation is materially related to and intertwined with the qualified issue.

Finally, the hearing officer concluded that the agency misapplied policy by failing to consider whether the grievant should have been placed on LTD-W status prior to sending her home. As the hearing decision notes, an employee who is on STD-Working status on the 180th day of the waiting period may change to LTD-W status on the 181st day. Because the grievant was working at least 20 hours per week in her own position on a continuing basis, the grievant would presumably have been eligible to be considered for LTD-W status (if her status has been STD-Working). Because the agency did not consider the grievant to be STD-Working, the agency essentially rendered her ineligible for LTD-W, which moved her into LTD. Thus, this inquiry and conclusion are also materially related to, and intertwined with the issue qualified by the Circuit Court.

Deference to the Agency

The agency asserts that the hearing officer erred by failing to give an appropriate level of deference to actions by agency management. This objection fails as well. Under the *Rules for Conducting Grievance Hearings*, the hearing officer “is not a ‘super-personnel officer’” and should give appropriate deference to actions that are consistent with law and policy.¹² In the case, the hearing officer found that the agency’s actions were not in accord with policy, thus he was not bound to give deference to the agency’s

⁸ *VSDP FAQ’s for VSDP Coordinators and Human Resource Departments*, pages 3-4.

⁹ *Id.*

¹⁰ Hearing Decision 855, p. 9 (emphasis added).

¹¹ *VSDP FAQ’s for VSDP Coordinators and Human Resource Departments*, pg. 2.

¹² *Rules for Conducting Grievance Hearings* § VI (A).

actions. Only when management actions are found to be *within* the ambit of state policy does the hearing officer afford deference.

Policy Issues

The agency has requested that the Director of the Department of Human Resources Management (DHRM) rule on whether the hearing officer's decision comports with policy. Under Virginia Code, the DHRM Director is the final authority on policy interpretation¹³ and policy based challenges to a hearing decision are appropriately directed to and addressed by the DHRM Director.¹⁴

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.¹⁵ (In this case, the hearing decision will become a final hearing decision once the DHRM Director issues her ruling, and if the ordered by the DHRM Director, the hearing officer issues a revised decision.)¹⁶ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.¹⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁸ This Department's rulings on matters of procedural compliance are final and nonappealable.¹⁹

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Director

¹³ Va. Code § 2.2-1201 (13). *See also* Murray v. Stokes, 237 Va. 653, 655-656; 378 S.E.2d 834, 835-836, (1989).

¹⁴ Va. Code § 2.2-3006 (A).

¹⁵ *Grievance Procedure Manual*, § 7.2(d).

¹⁶ If the DHRM Director upholds the original hearing decision and does not order the hearing officer to revise that decision, the original hearing decision becomes final upon the issuance of the DHRM Director's ruling.

¹⁷ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

¹⁸ *Id.* *See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

¹⁹ Va. Code § 2.2-1001 (5).