

Issue: Qualification/discrimination/race; Ruling Date: June 16, 2006; Ruling #2006-1334;  
Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services;  
Outcome: not qualified



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**  
**QUALIFICATION RULING OF THE DIRECTOR**

In the matter of Department of Mental Health, Mental Retardation and  
Substance Abuse Services  
No. 2006-1334  
June 16, 2006

The grievant has requested qualification of her October 14, 2005 grievance. She essentially claims that the agency misapplied or unfairly applied policy by failing to bring her back to work after she was released by her physician to return to work. She further asserts that the failure to allow her to return to work was racially motivated. For the reasons set forth below, this grievance is not qualified for hearing.

**FACTS**

The grievant was employed as an Administrative Assistant. As a result of a serious health condition, she went into Short Term Disability (STD) in May of 2004 and was placed into Long-Term Disability (LTD) in February of 2005. The agency sent the grievant a letter on February 16, 2005, describing how her benefits, insurance, retirement contributions and leave were affected by her "long-term disability separation."

The grievant asserts that she was released to return to work by her physician after Labor Day. On September 2, 2005, the grievant spoke with her immediate supervisor about coming back to work. She claims that she was referred to the Human Resource Office and finally to the Director of Facility Operations, who informed her that for budgetary reasons, her position had been abolished.

On September 16, 2005, the grievant wrote the Deputy Commissioner of Facility Operations to discuss the possibility of coming back to work with the agency. She asserts that she received a response, dated September 28, 2005, confirming that her position had been abolished. In addition, the September 28<sup>th</sup> letter explained that under the Virginia Sickness and Disability Program (VSDP), employees who transition into LTD are separated from service. The letter also informed the grievant that when a LTD employee is released to return to work, the employee may seek re-employment through the competitive process. The letter concluded by encouraging the grievant to "apply for any position for which you feel you are qualified in order that you may be considered for re-employment."

## DISCUSSION

### Misapplication of Policy

The grievant claims that management misapplied or unfairly applied policy, procedures, rules or regulations by not returning her to her Administrative Assistant position once she was cleared by her physician as able to resume work. 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.

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).<sup>1</sup>

Under the VSDP, employees are advised that “[y]our short-term disability benefits begin after a seven-calendar day waiting period.”<sup>2</sup> Further, on the eighth calendar day, after authorization by Unum Provident, short-term disability benefits provide days of income replacement and short-term disability payments up to 180 calendar days.”<sup>3</sup> The VSDP Handbook further states that long-term disability benefits begin at the conclusion of the 180 calendar days of short-term disability benefits.<sup>4</sup> Once an employee is moved into LTD, the Commonwealth’s VSDP administrator attempts to return the employee to work.<sup>5</sup> However, 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 *unless the agency has agreed to hold the position open for the employee*. 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 violated any mandatory VSDP policy provision when it moved her into LTD, thus separating her employment. Nor does it appear that the agency misapplied or unfairly applied policy when it failed to return

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<sup>1</sup> As provided in VRS's Virginia Sickness and Disability Program Handbook in effect at the time that the grievant transitioned into Long Term Disability, VRS “by law, has been given the authority to develop, implement and administer the VSDP. However, the authority granted is not intended to supersede 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 2004, “Authority and Interpretation,” page 30.

<sup>2</sup> VSDP Handbook 2004, “Short-Term Disability,” page 7.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*, “Long-Term Disability,” page 10.

<sup>5</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.*

the grievant to work. The VSDP Handbook states that once an employee moves from STD to LTD, return to her pre-disability position is not guaranteed.<sup>6</sup> The agency asserts that because of fiscal restraints, it decided that it could divide the grievant's work duties between other employees and thereby eliminate the grievant's position. Her position was abolished and remains so today. In sum, there is no evidence to suggest that the agency's actions were so unfair as to amount to a disregard of the intent of VSDP policy.

### Race Discrimination

The grievant asserts that the reason that she was not allowed to return to work was because of her race. Grievances that may be qualified for a hearing include actions related to discrimination on the basis of race.<sup>7</sup> To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status, in other words, that because of the grievant's race, she was treated differently than other “similarly-situated” employees. To do this a grievant must first establish a prima facie case of discrimination, i. e., that (1) she “is a member of a protected class”; (2) that she “suffered adverse employment action”; (3) that she “was performing [her] job duties at a level that met [her] employer's legitimate expectations at the time of the adverse employment action”; and (4) the adverse employment action occurred under circumstances raising an inference of unlawful discrimination.<sup>8</sup> If established, the burden then shifts to the employer to come forward with a legitimate, nondiscriminatory reason for the challenged employment decision.<sup>9</sup> If the employer meets this burden, the onus returns to the employee to demonstrate that the reason is pretextual and that discrimination was the motivating force behind the decision.<sup>10</sup>

The grievant, an African-American, is in a protected class. Assuming without deciding that (1) the grievant suffered an adverse employment action when she was not allowed to return to work after Labor Day, and (2) that she was performing her job duties at a level that met her employer's legitimate expectations at that time, the grievant has not provided evidence that that the refusal to allow her to return occurred under circumstances raising an inference of unlawful discrimination. The only person that the grievant identifies as similarly situated, was in fact, not so. The other employee, a Caucasian, was allegedly allowed to return after exhausting her STD leave. However, the agency distinguishes the other employee's case, noting that she had moved into LTD-Working status from STD-Working status. Under the then applicable VSDP, if an employee was in STD-Working status on the 180<sup>th</sup> day of the waiting period, she could be moved into LTD-Working status if she was able to work at least 20 hours per week in her own position.<sup>11</sup> For employees who were not in STD working on the 180<sup>th</sup> day or if the agency cannot continue to accommodate

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<sup>6</sup> *Id.*, “Long-Term Disability,” page 10.

<sup>7</sup> See Grievance Procedure Manual § 4.1(b).

<sup>8</sup> Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 285 (4th Cir. 2004) (en banc).

<sup>9</sup> See *Id.*

<sup>10</sup> See *Id.*

<sup>11</sup> VSDP FAQ's for VSDP Coordinators and Human Resource Departments, pages 3-4.

restrictions, the employee will be placed in LTD status, which, as explained above, results in separation of employment in the event that the agency elects not to hold the position open. Unlike the Caucasian employee, the grievant was not able to work, on her 180<sup>th</sup> day of STD, at least 20 hours per week in her own position.

It should also be noted that the grievant's immediate supervisor, an African-American who was *not* the decision maker in terms of abolishing the grievant's position, nevertheless indicated to this Department that she did not believe that race played any role in the decision to abolish the position.

#### APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the 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