Issues: Qualification / Benefits – FMLA, Benefits – VSDP; Ruling Date: April 6, 2007; Ruling No. 2007-1584; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: both issues 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. 2007-1584
April 6, 2007

The grievant has requested qualification of her December 27, 2006 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency). For the reasons set forth below, this grievance qualifies for a hearing.

FACTS

The grievant experienced a medical problem during the spring of 2006, leading to time on short-term disability (STD). Following the requisite seven-day waiting period, her STD benefits began on May 3, 2006. She was out of work on STD for twenty-three workdays, and returned to work, light-duty on June 3, 2006. The grievant apparently continued to work light-duty, or at least not full duty, for eight hours per day until she was approved to return without restriction on October 10, 2006. However, she quickly returned to the doctor and received a note, dated October 16, 2006, restricting her to working only eight hours per day, five days a week.

The grievant states that she received the letter from her doctor on October 17, 2006. She was not scheduled to work on October 18th or 19th. According to the grievant, she went to the facility's human resources office to turn in the doctor's letter on October 20th, but no one was in that office. The second-step respondent admits that the grievant gave the letter to the administrator on duty on October 20, 2006. The grievant has stated that this administrator told her that he would enter the information in the "system" and take the document to human resources. According to the agency, the document was received in human resources on October 23, 2006. However, the agency also maintains that it was "filed by a restricted duty person (who was assigned to file medical notes) without any Human Resource staff being aware of it."

Under this overtime restriction, the grievant continued to work eight hours per day. There is no evidence that the grievant was asked to work overtime during this period. On November 17, 2006, after receiving a general notice sent to all facility employees that

overtime restrictions would no longer be accommodated, the grievant went to human resources to remind them that she had an overtime restriction. Upon discovering the October 16, 2006 letter in the grievant's file, the agency decided to send the grievant home on November 29, 2006. Based on the overtime restriction, the grievant had rolled into long-term disability (LTD) as of October 25, 2006, when her STD period expired. The agency determined that the grievant's restriction would not be accommodated and referred her to Unum Provident for LTD benefits. According to the grievant, her doctor lifted the overtime restriction on December 21, 2006. The grievant has not returned to work since being put on LTD.

DISCUSSION

Virginia Sickness and Disability Program

The grievant claims that the agency misapplied or unfairly applied state policy by putting her in LTD status and effectively terminating the grievant from state employment. 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).[1]

"Long-term disability benefits for participating employees shall commence upon the expiration of the maximum period for which the participating employee is eligible to receive short-term disability benefits."[2] LTD is an "income replacement benefit" paid after the expiration of STD.[3] However, there is also a long-term disability working benefit (LTD-W). LTD-W "allows employees to continue to work for their agencies from STD working status."[4] LTD-W status is in effect when employees "working during STD (modified schedule or with restrictions) continue to work for their agency from STD working status into LTD for 20 hours or more per workweek in their own full-time position."[5]

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[1] As provided in VRS's Virginia Sickness and Disability Program Handbook in effect at the time that the grievant transitioned into LTD, "[t]he VRS Board of Trustees, by law, has the authority to develop, implement and administer VSDP. The Department of Human Resource Management is responsible for developing and interpreting leave and related personnel policies and procedures associated with VSDP." VSDP Handbook, July 2006 ("VSDP Handbook"), "Authority and Interpretation," p. 31.

[2] Va. Code § 51.1-1112(A); *see also* DHRM Policy No. 4.57, VSDP, p. 20 of 33 ("LTD benefits, which include LTD-W and LTD … begin at the conclusion of a 7 calendar day waiting period … and 125 workdays of receipt of a STD benefit."); VSDP Handbook, "Long-Term Disability," p. 13 ("Long-term disability benefits begin at the expiration of the maximum period of short-term disability.").

[3] DHRM Policy No. 4.57, VSDP, p. 3 of 33.

[4] DHRM Policy No. 4.57, VSDP, pp. 3-4 of 33.

[5] DHRM Policy No. 4.57, VSDP, p. 21 of 33.

After the grievant was given an overtime restriction, she was effectively on STD working (i.e., she was working with restriction), although presumably without receiving an income supplement benefit as she was working eight hours per day. On October 25, 2006, after her STD period expired, she rolled into LTD-W. Unlike an employee who is out of work on LTD, "[e]mployees in LTD-W are considered employees of the Commonwealth."[6] However, on the other hand, if an employee reaches LTD status, "[r]eturn to pre-disability position is not guaranteed," and "agencies can recruit and fill their pre-disability position."[7] Given this apparent distinction between the treatment of LTD-W and LTD employees, it is possible that an agency could violate state policy by immediately terminating, without just cause, an employee who rolls into LTD-W. DHRM Policy 4.57 further states that "[a]gencies should review [LTD-W] status every month to determine if they can continue to accommodate the restrictions based on agency business needs."[8] Consequently, employees on LTD-W could clearly be separated based on agency business needs.

In this case, however, the grievant has presented evidence to raise a sufficient question that the agency's business needs argument may have been unjustified. The grievant worked for over a month during which time, according to the agency's assertion, human resources believed the grievant was full-time, full-duty (i.e., they reportedly did not know she had an overtime restriction). There is no evidence that the grievant was requested to work overtime during this period. Alternatively, if the facility was aware of and respected the grievant's overtime restriction, then the facts could suggest that the facility was able to and already had accommodated the grievant's restriction. Because the agency was able to have the grievant on staff for more than a month without her working overtime, the grievant has presented sufficient evidence to raise a question that agency business needs might not be harmed by continuing to accommodate the grievant.

This Department recognizes that there is some ambiguity in the interplay between LTD-W and LTD. However, based on a plain reading of the policies, it appears the grievant has presented evidence raising a sufficient question as to whether state policy might have been violated. Given that employees in LTD-W are considered employees of the Commonwealth, it follows that some protections may be afforded against termination without cause. For these reasons, the grievant's claims related to her separation from state employment qualify for hearing. This qualification ruling in no way determines that the agency's actions were in fact improper, only that further exploration of the facts by a hearing officer is appropriate. A hearing officer is more properly suited to examine the facts and interpret the policies involved to rule on the grievant's claims.[9]

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[6] DHRM Policy No. 4.57, VSDP, p. 21 of 33 (emphasis added).
[7] DHRM Policy No. 4.57, VSDP, p. 20 of 33.
[8] DHRM Policy No. 4.57, VSDP, P. 21 of 33.
[9] Moreover, the hearing officer may wish to consider whether the facility's application of its policy (not accommodating employees who enters LTD-W status) in this case is consistent with law and policy. Rather than examining the grievant's specific circumstances and making a business needs analysis, there is evidence that could suggest that the agency may have decided to terminate the grievant once it discovered she had rolled into LTD-W based on the facility's broad policy of not accommodating any LTD-W status employees.

Family and Medical Leave Act (FMLA)

DHRM Policy 4.57 provides that "[e]mployees who have not exhausted the 12 week period of FMLA time will continue to be covered by FMLA for the remaining period of eligibility when placed in LTD-W."[10] An eligible employee can take up to 12 workweeks (60 workdays or 480 work hours) of unpaid FMLA leave per calendar year.[11] One of the permissible reasons for taking such leave is "because of a serious personal health condition that renders the employee unable to perform the functions of his or her position."[12]

A serious health condition is defined as an "illness, injury, impairment or physical or mental condition that involves: (1) inpatient care in a hospital, hospice, or residential medical care facility; or (2) continuing treatment by a health care provider."[13] The grievant's medical condition, based upon the grievant's continued treatment with her doctor, would appear to qualify as a serious health condition under this policy. Because of this health condition, the grievant's doctor restricted her from working overtime, which was a requirement of her job.[14]

Under VSDP, FMLA leave runs concurrently with disability leave.[15] However, the grievant was out of work on disability for only twenty-three work days during 2006. For the rest of her time with the agency in 2006, she worked full eight-hour days. Consequently, the grievant still had at least thirty-seven workdays, or 296 work hours, of FMLA leave time available for 2006 to credit towards any time she was requested to work overtime and/or to protect her job until she was able to return full-time, full-duty. Intermittent FMLA leave is permitted by the Act for a serious health condition of the employee.[16] Utilizing such leave to cover the grievant's inability to work overtime is a potentially proper use of FMLA leave.[17] Moreover, in the alternative, according to the grievant, her doctor lifted her overtime restriction as of December 21, 2006, which is only 15 workdays after the grievant was sent home. The very basis of the FMLA is to afford eligible employees job protection.[18] The grievant has presented evidence raising a sufficient question as to whether the agency failed to allow her to utilize FMLA leave to cover her overtime restriction and/or the period of time between November 29th, when she was sent home, and December 21st, when her physician lifted her restrictions. As such, her grievance qualifies for hearing.

APPEAL RIGHTS AND OTHER INFORMATION

[10] DHRM Policy No. 4.57, VSDP, p. 23 of 33.
[11] DHRM Policy No. 4.20, Family and Medical Leave ("FMLA Policy"), p. 2.
[12] *Id.* at 3.
[13] *Id.* at 2.
[14] The grievant has stated that the agency's policy on mandatory overtime is changing, and that overtime will no longer be a requirement of positions with the agency in July 2007.
[15] VSDP Handbook, "Family and Medical Leave," p. 23.
[16] 29 U.S.C. § 2612(b).
[17] *See* Whitaker v. Bosch Braking Sys. Div., 180 F. Supp. 2d 922, 933 (W.D. Mich. 2001).
[18] *See* 29 U.S.C. § 2614.

For the reasons set forth above, the grievant's December 27, 2006 grievance is qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.

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Claudia T. Farr
Director