

Issue: Qualification/benefits/leave/VSDP; Ruling Date: January 23, 2007; Ruling #2007-1519; Agency: Department of Corrections; Outcome: not qualified



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

In the matter of Department of Corrections  
No. 2007-1519  
January 23, 2007

The grievant has requested qualification of his February 8, 2006 grievance with the Department of Corrections (DOC or the agency). For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The grievant went out on disability on December 23, 2005, which was the first day of the seven calendar-day waiting period prior to the receipt of short term disability (STD) benefits. According to agency time records, the grievant's annual and compensatory leave was utilized during this seven calendar-day period while the grievant was out of work. On the eighth day, December 30, 2005, STD benefits began. The grievant's time sheet reflects that either disability or holiday leave was applied for the grievant's work days while he was on STD. The final day of STD approved by the VSDP third party administrator (or "TPA") was January 19, 2006. The grievant, however, did not return to work until January 21, 2006, following his doctor's orders. Therefore, the agency applied adjusted overtime for the grievant's time on January 20, 2006, while the grievant was absent.

DISCUSSION

The grievant asserts that the agency either misapplied or unfairly applied policy during his time on STD in December 2005 and January 2006. The grievant questions the way in which his leave time was applied during the seven calendar-day waiting period before STD benefits were paid and also during the period of STD. The grievance, however, does not raise a sufficient question as to whether policy was violated such that it would qualify for a hearing.

*Misapplication or Unfair Application of Policy*

The grievant claims that management misapplied or unfairly applied policy, procedures, rules or regulations. 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>

#### Seven Calendar-Day Waiting Period

“Short-term disability benefits for participating employees shall commence upon the expiration of a seven-calendar-day waiting period.”<sup>2</sup> The grievant asserts that during the seven calendar-day waiting period while he was out of work, his time should have been accounted for as eight-hour days, rather than the twelve-hour days he usually works. DHRM Policy No. 4.57 (Virginia Sickness and Disability Program) provides that “employees working alternate schedules must revert back to the standard 5-day/40 hour schedule when they are *approved to receive STD benefits* and remain in this status until released to return to work full-time/full duty without restrictions.”<sup>3</sup> Because the grievant normally worked twelve-hour days, once he was approved to receive STD benefits, his time would be accounted for according to the 5-day/40 hour schedule rather than his normal schedule. However, in accordance with the policy, this reversion does not take place until the employee is “approved to receive STD benefits.” Therefore, the agency does not appear to have misapplied or unfairly applied any policy in accounting for the grievant’s time as twelve-hour days during the seven calendar-day waiting period.

#### Period of Disability

The grievant’s disability claim was approved to commence by the third party administrator on December 30, 2005. From that date until the grievant’s approved period of disability ended on January 19, 2006, the grievant’s time was accounted for in 8-hour days Monday through Friday on disability time, except for three holidays. There does not appear to be any evidence of a misapplication or unfair application of policy for the treatment of the grievant’s time during his period of disability.

#### Return to Work

The grievant returned to work on January 21, 2006, in accordance with his doctor’s approval. However, the TPA had only approved the grievant’s STD benefits through January

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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 was on 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 2005 (“VSDP Handbook”), “Authority and Interpretation,” p. 30.

<sup>2</sup> Va. Code § 51.1-1110(A); *see also* DHRM Policy No. 4.57, *Virginia Sickness and Disability Program* (“VSDP”), pp. 14-15 of 33; VSDP Handbook, “Short-Term Disability,” p. 7.

<sup>3</sup> DHRM Policy No. 4.57, *VSDP*, p. 9 of 33 (emphasis added).

19, 2006.<sup>4</sup> As a result, the agency was unable to account for January 20, 2006 as a disability leave day.<sup>5</sup> However, because the grievant had not been approved by his doctor to return to work full-time/full duty until January 21, 2006, in accordance with DHRM Policy No. 4.57, the agency continued to account for the grievant's time in 8-hour days.<sup>6</sup> Adjusted overtime leave<sup>7</sup> was applied to the grievant's absence from work on January 20, 2006. The grievant has not presented any evidence that the agency misapplied or unfairly applied policy in this instance.<sup>8</sup> Consequently, there is no evidence to suggest that the agency's actions violated any mandatory state policy or were so unfair as to amount to a disregard of the intent of VSDP policy. As such, the grievance is not qualified for hearing.

### *Grievance Form Error*

The grievant has raised the concern that on the Grievance Form A, the box in section V was checked "yes," qualifying the grievance for hearing, but the agency head's letter specifically stated that the grievance was *not* qualified. This Department has repeatedly held that in determining what, if any, issues have been qualified by an agency head, the plain language of the Grievance Form A or any attachment is determinative.<sup>9</sup> In this case, although the "yes" box was checked, the agency head's contemporaneous letter clearly and unambiguously stated that the grievance was not qualified. This clear intention expressed in the agency head's contemporaneous words carries more weight than the checking of a box, which is potentially subject to an inadvertent mistake.<sup>10</sup>

While the mistake on the Form A box is unfortunate, there is no indication that the grievant detrimentally relied upon the agency's error. The grievant still timely appealed to this Department for a qualification ruling because he apparently understood that the agency intended not to qualify the grievance.

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<sup>4</sup> The letter from the TPA indicates that it was aware the grievant had been approved to return to work on either January 21 or January 23, but noted that benefits were approved through January 19. It is unclear why the TPA only approved the grievant's period of disability through January 19<sup>th</sup> if it was aware that he was not to return to work until at least two days later. However, the grievant's appeal on this issue was with VRS itself, not the agency or EDR. See VSDP Handbook, "Review and Appeals Procedure," p. 26.

<sup>5</sup> DHRM Policy No. 4.57, VSDP, p. 14 of 33 ("STD payments shall be made during periods of absences approved by the TPA.").

<sup>6</sup> DHRM Policy No. 4.57, VSDP, p. 9 of 33.

<sup>7</sup> According to the agency, adjusted overtime is overtime accumulated during the 28-day cycle, which is adjusted at the end of the cycle (with time off) instead of paying overtime compensation.

<sup>8</sup> Because the grievant was absent from work on January 20, 2006 based on a doctor's order, he would have been able to use sick leave to cover his absence, if he had any remaining sick leave. However, by this point, the grievant had exhausted his sick leave. Moreover, the grievant has not been harmed in that he was still on paid leave and there is no evidence of any further detriment suffered.

<sup>9</sup> E.g., EDR Ruling Nos. 2006-1388, 1389; EDR Ruling Nos. 2006-1099, 1104; EDR Ruling No. 2005-1015; EDR Ruling No. 2004-611.

<sup>10</sup> This Department has ruled previously in cases, such as EDR Ruling No. 2004-696 and EDR Ruling No. 2004-611, that both the grievant and the agency will be bound by notations made on the Form A. EDR held in those cases that subsequent attempts to change the notations would be unfair to the opposing parties. However, this case differs from those previous matters because of the agency head's contemporaneous letter.

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