

Issues: Access to the Grievance Procedure (reconsidered) and Compliance – Benefits/Leave (VSDP); Ruling Date: October 24, 2007; Ruling #2008-1771; Agency: Virginia Information Technologies Agency; Outcome: Access Denied, Compliance issue referred to DHRM.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

**RECONSIDERED COMPLIANCE AND ACCESS
RULING OF DIRECTOR**

In the matter of Virginia Information Technologies Agency
Ruling Number 2008-1771
October 24, 2007

Pursuant to the June 18, 2007 order from the Circuit Court for the City of Richmond, the following is in reconsideration of EDR Ruling Number 2007-1570.

FACTS

In EDR Ruling Number 2007-1570, this Department addressed the grievant's request for a compliance and access ruling. The Virginia Information Technologies Agency (the agency) had asserted that the grievant did not initiate her grievance within the thirty calendar-day time period required by the grievance procedure. Although this Department determined that the grievance was timely, EDR ruled that the grievant nevertheless did not have access to the grievance procedure when she initiated the grievance because she was on long-term disability (LTD) and raised an issue unrelated to her separation from state employment.¹

The grievant appealed EDR Ruling Number 2007-1570 to the Circuit Court for the City of Richmond. By order of June 18, 2007, the court remanded the grievance to EDR.² In the order, the court noted concern about whether the grievant had "notice of the need to act in order to preserve her grievance rights" before transitioning to LTD. Therefore, this Department was directed to reconsider whether, as a matter of policy, the Department of Human Resource Management (DHRM) or individual employing agencies have a duty to inform employees that transitioning into LTD is tantamount to separation from state service.

¹ EDR Ruling No. 2007-1570.

² This order was not received at EDR until Aug. 14, 2007. In addition, although there is no express authority in the grievance statutes for a circuit court to remand grievance matters to the entity whose decision is being reviewed, it would appear that in appropriate circumstances the court would inherently have such authority under the statutory grant of judicial review under the grievance statutes. *See Jones v. Willard*, 224 Va. 602, 606-07, 299 S.E.2d 504, 507-08 (1983).

DISCUSSION

Whether such a duty is provided by state policy is a determination normally reserved for DHRM. However, a review of the relevant DHRM policies does not reflect that there is currently an explicit duty to notify an employee that transitioning into LTD is tantamount to separation. Consultation with DHRM's policy analysis and development staff has informally confirmed this analysis.

Although there may not be a provision in state policy that establishes such a requirement, best practices would encourage DHRM and employing agencies to make the notification to employees contemplated by the circuit court's order. For example, for agencies to establish a timeliness defense in similar cases under the grievance procedure, this Department has ruled that there is a duty to inform employees transitioning into LTD, clearly and unambiguously, 1) whether the employee's position is being held open, and if the position is not being held open, (2) that the employee's employment with the Commonwealth will end as a consequence of moving into LTD. Without providing this information, an employee does not receive adequate notice that his or her employment has ended.³ Such notification would also be consistent with the principles of due process.⁴

As pointed out by the circuit court, state policy does not expressly state that transitioning to LTD is effectively a separation from state employment. DHRM Policy 4.57 provides, "Employees in LTD are considered to be inactive employees of the Commonwealth."⁵ It is not readily clear what the status of an "inactive employee" would be. In addition, DHRM Policy 1.70 does not include any discussion of LTD as a manner by which an employee can become separated.⁶ The Virginia Sickness and Disability Program Handbook for Participants ("VSDP Handbook"), authored by the Virginia Retirement System, does state, however, that "Long-term disability participants are not considered employees of the Commonwealth of Virginia while they are on long-term disability, and your agency is allowed to recruit for and fill your position."⁷ DHRM Policy 4.57 makes it a "responsibility" of an employee to carefully read this handbook and understand the features of VSDP, which includes LTD.⁸

³ *E.g.*, EDR Ruling No. 2006-1273; *see also* EDR Ruling No. 2006-1187 ("[I]t is imperative that an agency inform its employees when their employment with the Commonwealth has terminated as a result of moving into LTD.").

⁴ "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

⁵ DHRM Policy 4.57, *Virginia Sickness and Disability Program* ("VSDP"), "Long-Term Disability."

⁶ DHRM Policy 1.70, *Termination/Separation from State Service*.

⁷ Virginia Sickness and Disability Program Handbook for Participants, July 2006, *Long-Term Disability*, at 13.

⁸ DHRM Policy 4.57, *VSDP*, "Responsibilities."

It is this Department's recommendation that clearer notice should be provided to employees. For example, it might be a good practice for individual agencies to advise employees close to the end of their short-term disability period that they will be effectively separated from employment with the Commonwealth if and when they transition into LTD. Indeed, such a notification could be consistent with each agency's responsibility to communicate with employees during their absence.⁹ DHRM might consider providing further guidance in this regard to agencies, or modifying Policy 4.57 to better apprise employees of the effects of LTD status.

CONCLUSION

Because the grievant's status was not that of an employee of the Commonwealth at the time she initiated her grievance for the reasons discussed in the original ruling (Ruling No. 2007-1570), this Department's initial decision remains effective. The grievance was filed within the 30-calendar day period and is timely; however, the grievant did not have access to the grievance process to challenge her performance evaluation. EDR will forward this ruling and a copy of the circuit court's order to the Director of DHRM for further consideration of the matters discussed above to determine whether, in the DHRM Director's discretion, state or agency policies should be modified to provide further explanation of the status of an employee on LTD in the future.

Claudia T. Farr
Director

⁹ *Id.*