

Issue: Qualification – Leave/Benefits (VSDP); Ruling Date: July 23, 2010; Ruling #2010-2667; Agency: Department of Motor Vehicles; Outcome: Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF THE DIRECTOR

In the matter of Department of Motor Vehicles
Ruling No. 2010-2667
July 23, 2010

The grievant has requested qualification of her February 12, 2010 grievance with the Department of Motor Vehicles (the agency). For the reasons set forth below, this grievance qualifies for a hearing.

FACTS

The grievant experienced a medical issue on July 22, 2009, which led to her being placed on short-term disability (STD). The grievant would have been eligible for STD benefits beginning on July 30, 2009 but, because the grievant apparently did not call in her claim within 14 days of the onset of her medical condition, her award of STD benefits was delayed. Notwithstanding the benefit award delay, the grievant's potential eligibility for up to 125 workdays of STD benefits began on July 30, 2009.¹ Because of a coding error made by the Commonwealth's Third Party Administrator (TPA) of the Virginia Sickness and Disability Program (VSDP), the grievant's last date of potential eligibility for STD benefits was mistakenly calculated as January 22, 2010. The correct date should have been January 20, 2010.

As the grievant neared the end of the 125 workday STD period, the grievant asserts that she had scheduled an appointment with her physician for January 18, 2010. However, the grievant reports that as a result of her physician being called away for an emergency, her appointment was canceled. The grievant contacted the TPA to advise that her physician would not be available until January 29th. The TPA informed the grievant that her approved STD would be extended to the maximum allowed under policy, which effectively meant that she would be granted an additional day of approved STD benefits, which would expire on

¹ The grievant's first day of absence was July 23, 2009. VSDP policy requires a seven-day waiting period before STD benefits are available. Thus adding seven days to the July 23rd date, yields the beginning date of the grievant's 125 workdays of potential VSDP benefits, July 30, 2009.

January 22, 2010.² The TPA sent the grievant a letter dated January 19, 2010, informing her that STD benefits “will end on January 22, 2010.”

The grievant was able to reschedule her appointment with her physician for January 20, 2010. That day, her physician provided her with a Return to Work (RTW) authorization that had at least one restriction.³ The grievant contacted the agency the following day to request her work schedule and to provide the RTW authorization. The grievant read the RTW to an agency manager. According to the agency, the manager forwarded the RTW information to the agency’s central office for consideration. The agency ultimately rejected the authorization and informed the grievant that she needed to come back full duty with no restrictions. Accordingly, the grievant contacted her physician that same afternoon to see if she could be unconditionally released.

The following day, January 22, 2010, the grievant contacted the agency to explain that her physician’s office would be providing a revised authorization with no restrictions. The manager informed the grievant that she would have to present her RTW to the central office. According to the grievant, when she contacted the central office, she was told that she no longer had a job as of that day. The grievant explained that there must be a mistake. According to the grievant, she was told that her situation would be examined but she was not called back.

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 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). DHRM Policy 4.57 provides, “Employees in LTD are considered to be inactive employees of the Commonwealth.”⁴ Likewise, the Virginia Sickness and Disability Program Handbook for

² The grievant’s *approved* STD benefits had previously been scheduled to end on January 21, 2010, one day prior to the expiration of the erroneously calculated January 22, 2010 date, the date at which any *potential eligibility* for benefits would expire.

³ The grievant asserts that the restriction was a requirement that the grievant be accompanied by another agency employee while she conducted her first three or four driving tests. The agency contends that the RTW contained the additional restriction of no stress and that the testing restriction was for 4 months rather than three-four times.

⁴ DHRM Policy 4.57, *Virginia Sickness and Disability Program* (“VSDP”), “Effects of LTD on Status.”

Participants (“VSDP Handbook”), authored by the VRS, states 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.”⁵ Thus, the typical net effect of movement into LTD is that the employment relationship is, for all practical purposes, severed. In this case, the grievant’s movement into LTD on January 21, 2010 led to her job loss. The grievant essentially asserts that she was unfairly terminated from her job because of the mistake made by the TPA regarding the duration of her STD benefits.

For the reasons explained below, we believe that this grievance should advance to a grievance hearing. Here, the grievant apparently relied upon the dates provided by the TPA.⁶ Indeed, the TPA itself did not discover the STD benefit end date error until January 25, 2010, after STD had ended. It appears that the grievant had numerous conversations with the TPA, and that the TPA itself used and relied upon the erroneous date, even adjusting the last day of approved benefits to coincide with the erroneous last day of potential eligibility for benefits. As noted above, the grievant contacted her physician and was able to get an appointment on January 20th, two days prior to the date that the TPA had indicated would mark the end of the grievant’s eligibility for STD benefits. The grievant provided a RTW to the agency the next day, again prior to the expiration of the stated (but erroneous) January 22nd end of STD benefits. According to the grievant, when the agency rejected her RTW because it contained a restriction, she contacted her physician and secured a revised RTW with no restrictions effective January 25, 2010. (The grievant asserts that the effective date of January 25th was used by her physician because that was next date that she normally would have worked.) On the day identified (erroneously) as her last day of STD (January 22, 2010), the grievant attempted to provide the revised RTW to the agency. According to the grievant, it was ultimately refused and the grievant was allegedly told that she no longer had a job.

As noted above, 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. Here, the grievant appears to have attempted to timely—at least based on her understanding of what constituted timely, as shaped by representations by the TPA—provide information related to her ability and readiness to return to work. There remain questions as to whether the agency’s refusal to allow her to return to work under the circumstances present here constitute disregard of the intent of the applicable policy which is defined as “Encourag[ing] rehabilitation with an ultimate goal to return employees back to gainful employment when medically able,”⁷ and providing “protection” to employees who are

⁵ Virginia Sickness and Disability Program Handbook for Participants, 2009, *Long-Term Disability*, at 13.

⁶ “Unum evaluates your claim and monitors your continued eligibility for disability benefits.” VSDP Handbook, *Review and Appeal Procedure*, at 31.

⁷ DHRM Policy 4.57, *Purpose*; VSDP Handbook, *Introduction to the Virginia Sickness and Disability Program*, at 6. (“The program encourages rehabilitation to help you return to gainful employment as soon as medically appropriate.”)

disabled and cannot work.⁸ Thus, this grievance raises a sufficient question of whether an unfair application of policy may have occurred to warrant qualification for a hearing.

This ruling is not meant to indicate that the agency in fact misapplied or unfairly applied policy. Further, no part of this ruling is meant to suggest that this Department has found sufficient evidence to establish the grievant's case at hearing. This ruling only determines that there are sufficient questions raised by the unique facts of this case to qualify for hearing under a theory of misapplication or unfair application of policy⁹.

CONCLUSION AND OTHER INFORMATION

For the reasons set forth above, the grievant's February 12, 2010 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.

Claudia T. Farr
Director

⁸ VSDP Handbook, at 2 and 6.

⁹ We note that the grievant's physician did not release her until January 25, 2010, which was beyond even the erroneously provided January 22, 2010 expiration of STD benefits. Qualification of this grievance should in no way be viewed as evidence that this Department does not recognize the critical nature of dates as they relate to a date-driven process such as the VSDP. However, under the particular facts here, we nevertheless believe qualification is appropriate. The grievant asserts that the reason her physician used the 25th as the RTW date is because it was the next day that she was scheduled to work. She had apparently already been cleared to work with restrictions through a RTW on January 21, 2010. When that RTW was deemed unacceptable, the grievant contacted her physician and the restriction was subsequently removed. There is no obvious reason to believe that if the agency had informed the grievant that the RTW provided on January 22nd was unacceptable that the date could not have been changed to the 22nd. The TPA stated to this Department that the physician notes in their file indicated that as of January 20, 2010, the actual date that STD benefits expired, the grievant could return to work without restrictions.