

Issue: Qualification – Benefits/Leave (VSDP); Ruling Date: September 28, 2010;  
Ruling #2011-2724; Agency: Virginia Department of Transportation; Outcome: Not  
Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION RULING OF THE DIRECTOR**

In the matter of Department of Transportation  
Ruling No. 2011-2724  
September 28, 2010

The grievant has requested qualification of his February 12, 2010 grievance with the Department of Transportation (the agency). For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The grievant was separated from employment after he completed the full short-term disability (STD) period of benefits without being cleared to return to work, rolling into long-term disability (LTD) status. The grievant challenges this action because he believes the STD period was not properly calculated and he was not notified of the end of that period.<sup>1</sup> He appears to seek reinstatement of his job.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.<sup>2</sup> Further, complaints relating solely to the establishment or revision of wages, salaries, position classifications, or general benefits “shall not proceed to a hearing.”<sup>3</sup> Accordingly, challenges to such decisions do not qualify for a hearing unless the grievant presents evidence raising a sufficient question as to whether the agency misapplied or unfairly applied policy, or discrimination, retaliation or discipline improperly influenced the decision.<sup>4</sup> In this case, the grievant asserts that the agency either misapplied or unfairly applied the Virginia Sickness and Disability Program (VSDP) policy.

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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”<sup>5</sup> Thus, typically, a threshold question is whether the grievant has suffered an adverse

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<sup>1</sup> Additional facts that pertain to these issues will be included in the Discussion section below.

<sup>2</sup> Va. Code § 2.2-3004(B).

<sup>3</sup> Va. Code § 2.2-3004(C).

<sup>4</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.

<sup>5</sup> See *Grievance Procedure Manual* § 4.1(b).

employment action.<sup>6</sup> An adverse employment action is defined as a “tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”<sup>7</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>8</sup> Because this case involves the loss of a job, it will be assumed, for purposes of this ruling only, that the grievant experienced an adverse employment action.

By statute and under the VSDP Policy, “[s]hort-term disability benefits for participating employees shall commence upon the expiration of a seven-calendar-day waiting period.”<sup>9</sup> On the eighth calendar-day, after authorization by the VSDP provider, short-term disability benefits are provided for a maximum of 125 workdays.<sup>10</sup> “[L]ong-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.”<sup>11</sup> LTD is an “income replacement benefit” paid after the expiration of STD.<sup>12</sup> If an employee reaches LTD status, “[r]eturn to employee’s pre-disability position [is] not guaranteed,” and “agencies can recruit and fill their pre-disability position.”<sup>13</sup>

The grievant’s period of disability began on July 30, 2009. Counting 125 workdays from August 6, 2009, which was the eighth day after the initial date of disability,<sup>14</sup> the records accurately reflect that the final day of STD for the grievant was January 27, 2010. There does not appear to be any misapplication of policy with regard to this calculation.<sup>15</sup>

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<sup>6</sup> While evidence suggesting that the grievant suffered an “adverse employment action” is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an “adverse employment action.” For example, consistent with recent developments in Title VII law, this Department substitutes a lessened “materially adverse” standard for the “adverse employment action” standard in retaliation grievances. See EDR Ruling No. 2007-1538.

<sup>7</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>8</sup> *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4<sup>th</sup> Cir. 2007).

<sup>9</sup> Va. Code § 51.1-1110(A); see also DHRM Policy No. 4.57, *Virginia Sickness and Disability Program (VSDP)*.

<sup>10</sup> Va. Code § 51.1-1110(B); see also DHRM Policy No. 4.57.

<sup>11</sup> Va. Code § 51.1-1112(A); see also DHRM Policy No. 4.57 (“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.”).

<sup>12</sup> DHRM Policy No. 4.57.

<sup>13</sup> DHRM Policy No. 4.57.

<sup>14</sup> The grievant is incorrect in his apparent argument that the seven-day waiting period is calculated in work days. DHRM Policy 4.57 specifically contemplates calendar days.

<sup>15</sup> Documentation provided by the agency reflects that the grievant’s STD benefits began on August 10, 2009. This result appears to be based on the agency’s interpretation of the 14-day “look back” provision in DHRM Policy 4.57. However, documentation from the third party administrator appears to indicate that the benefits period actually began on August 6, 2009, which appears to be correct and would have been within 14 days of the grievant submitting his claim on August 17, 2009. It is unclear from this record when the grievant actually began receiving STD benefits. However, that issue does not impact this case because both the 125 work day period of STD and, therefore, the date when the grievant rolled into LTD are unaffected. Further, an allegation that the grievant did not receive appropriate benefits in August 2009 was not raised in this grievance. Nor could it have been as this grievance was filed in February 2010 after the grievant’s separation. See *Grievance Procedure Manual* § 2.3 (an employee must have been employed by the Commonwealth at the time the grievance is initiated, unless the action grieved is a termination or involuntary separation, in which case the employee may initiate a grievance within 30 calendar days of the termination or separation).

According to information provided with the ruling request, the grievant went to the doctor on January 28, 2010. He apparently contacted his supervisor that same day and informed him that he was being cleared to return to work on the following Tuesday, February 2, 2010. The supervisor reportedly informed him that he needed to submit a doctor's note as soon as possible. The note that was submitted on January 29, 2010, allegedly indicated that the grievant was not cleared to return to work until February 2, 2010. We do not see any other appropriate calculation of the 125 workdays of STD benefits that would extend to encompass this return to work date. Therefore, this Department can find no misapplication or unfair application of policy in rolling the grievant into LTD. The grievant was not cleared to work, with or without restrictions, before the STD period ended.

Once an employee is moved into LTD, the employee is not considered an employee of the Commonwealth. 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.*<sup>16</sup> It does not appear that the agency agreed to hold the grievant's position open. Accordingly, the grievant has not presented evidence that the agency violated any mandatory VSDP policy provision when it moved him into LTD, effectively separating him from employment with the Commonwealth.

Even if we assume that the grievant is correct and he was never notified about the specific end date of his STD period, this fact does not alter the resolution of this case. While it would certainly be a better practice to keep employees informed of the extent of the STD period, there does not appear to be any explicit requirement in the VSDP policy to provide this notification. As such, we cannot find that any assumed action or inaction in this case should operate to extend the period of STD benefits to enable the grievant to return to work. There is no basis to qualify this grievance for a hearing.

#### 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 this Department's qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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

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<sup>16</sup> See EDR Ruling No. 2006-1334.