Issue: Administrative Review of Hearing Officer's Decision in Case No. 9381; Ruling Date: November 29, 2010; Ruling No. 2011-2809; Agency: Department of Corrections; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2011-2809
November 29, 2010

The Department of Corrections (DOC or the agency) has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9381. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The salient facts as set forth in Case Number 9381 are as follows:

> The grievant began working for the Virginia Department of Corrections as a Correctional Officer on August 8, 2002. She continued her employment with that agency on a full-time basis until the events giving rise to this grievance occurred. Her employment status entitled her to participate in the Virginia Sickness and Disability Program. The Virginia Retirement System administers that program. A private company, UNUM, serves as the third-party administrator for the program. The program provides income replacement benefits for covered employees classified as either having a Short-Term Disability ("STD") or Long-Term Disability ("LTD"). Short-Term Disability benefits are available, after a 7-calendar day waiting period, to a disabled employee for a maximum of 125 workdays. Long-Term Disability benefits commence upon the expiration of the 7 calendars day waiting period and 125 workdays of STD benefits. A disability is defined as "an illness or injury or other medical condition, including pregnancy, that prevents an employee from performing the duties of his or her job." A disability can be total or partial. The program is set forth in Policy No. 4.57 of the Department of Human Resource Management ("DHRM").
>
> Shortly before September 16, 2008, the grievant injured one of her legs. She contacted UNUM and applied for STD benefits under the program. UNUM approved the claim and provided benefits to the grievant until November 19, 2008. On the following day, the grievant was

returned to work under the agency Return To Work ("RTW") program. That program allows employees with restrictions to work in a light-duty capacity, subject to certain further conditions. The RTW policy provides for participation of a maximum of 90 days. It is designed to correlate with DHRM Policy 4.57.

UNUM approved the payment of benefits to the grievant through November 19, 2008. On that date a Senior Vocational Rehabilitation Consultant with UNUM provided to the agency notice that the grievant had been released to return to work on the following day. This return was conditioned on the following restrictions: no running, minimal climbing, limit to desk work, no driving more than two hours, away from inmates, work eight hours per day. On that same day, UNUM, through a Disability Benefits Specialist, notified the grievant that it was approving the restrictions through January 13, 2009. UNUM stated that benefits could not be extended beyond January 13, 2009 unless the grievant submitted additional medical information to it. If that information was not received, the file would be closed.

Upon her returning to work, the agency placed the grievant in a position at the Walk-Through Sally Port. This post carried with it generally lighter duties than that of a yard officer, the post previously held by the grievant. The agency placed her on a schedule of working 8 hours per day, 5 days per week. This schedule was a change from her prior schedule of working 12-hour shifts totaling 80 hours over a standard two-week pay period. The agency continued working the grievant at this post until early April 2009. While working the Sally Port, the grievant climbed a set of stairs on a regular and frequent basis. She would assist the yard officers, and helped in the counting of inmates. She had regular contact with inmates and was not limited to deskwork.

Continuing problems with her leg forced the grievant to need surgery on it in early April 2009. She again contacted UNUM regarding a Short-Term Disability claim. UNUM responded on April 27 approving the claim but stating that the benefits would end on March 16, 2009 [sic]. The letter from the Disability Benefits Specialist for UNUM stated that her file was being reviewed for LTD consideration. This letter was from the same specialist who had sent the letter of November 19, 2008 setting the cutoff for benefits as January 13, 2009.

An Employee Benefits Manager for the agency wrote to the grievant on April 30 advising her that she was being transitioned to Long-Term Disability status. Because of this transition, the grievant lost her position with the agency. Upon her being able to return to work at a full-time, full-duty position, she was eligible to apply for available positions

> through the normal recruitment process. The transition was based on a determination that her light-duty status ended on April 27, 2008 [sic]. UNUM has paid to the grievant LTD benefits for approximately one month, April 28, 2009 through May 26, 2009.[1]

Based on the foregoing findings of fact, the hearing officer made the following conclusions:

> The policy that the grievant claims was unfairly or misapplied is DHRM Policy No. 4.57. Pursuant to Section 5.8 of the GPM, the grievant has the burden of proof by a preponderance of the evidence. I conclude that the grievant has met this burden.
>
> In comparing the arguments presented by the parties, they have essentially reduced this matter to the single issue of whether the grievant was fully returned to work on a pre-disability basis prior to March 16, 2009. The grievant asserts that she was working without restrictions because those restrictions were not being honored by the agency. She further asserts that she was working full-time because her total hours during a pay period equaled those of her pre-disability schedule.
>
> The agency, on the other hand, asserts that the grievant was never medically cleared to return to employment and that the change in her posts and schedule are determinative of her status. At the hearing, the agency argued that under the VSDB the burden of taking affirmative action was on the grievant with regard to complying with the program. This argument is entirely consistent with the letter of November 19, 2008 from the Disability Benefits Specialist to the grievant notifying her that her benefits could not be extended beyond January 13, 2009 unless she provided additional information. No evidence was presented that the grievant presented that additional information.
>
> The agency further asserts that the entitlement of the grievant to STD benefits ended on March 16, 2009. That date was merely an administrative fictitious date based on the date of September 16, 2008 for the beginning of benefits and calculating 125 workdays forward from the earlier date. My interpretation of the policy is that March 16 is the latest date on which the grievant could have received Short-Term Disability benefits based on her initial filing. I find, however, that her eligibility under that claim ended on January 13, 2009 as specified by UNUM.

[1] Decision of Hearing Officer, Case No. 9381, issued September 30, 2010 ("Hearing Decision") at 2-4. By adding the "[sic]" designation, this Department notes that the hearing decision's statement in the cited text that the grievant's "light-duty status ended on April 27, 2008" clearly appears to be a typographical error that was intended to read "April 27, 2009."

Therefore, based on that finding, the grievant should not have been transitioned to LTD status because she had been eligible for STD benefits for less than 125 work days as set forth in the applicable policy.

The argument of the agency further ignores the actual work of the grievant commencing November 20, 2008 and continuing thereafter until April 2009. As stated above, the grievant was working with many duties required of her in violation of the restrictions imposed by UNUM on November 19, 2008. I find it significant that the Chief of Security for the facility, when asked about whether the Sally Port position was "light-duty," responded strictly in terms of the eight-hour workday. The testimony of the grievant regarding her additional duties was largely uncontradicted. I view the testimony of the Chief of Security as being at least implicitly a corroboration of the testimony of the grievant. Therefore, I cannot find that the grievant was not working full-time, full-duty on March 16, 2009. I find that she was improperly transitioned to a LTD status on April 27, 2009 to the extent that the agency relied on that determination.

In addition to the reasons cited above, I also find that the action of the agency ignores the plain wording of Policy 4.57. The definition of a "Long-Term Disability benefit" speaks in terms of 125 workdays "of receipt (emphasis mine) of STD benefits." If the grievant was eligible for STD benefits from September 16, 2008 through March 16, 2009, it is undisputed that she did not receive benefits for those 125 workdays.

Policy 4.57 is designed to implement Chapter 11 of Title 51.1 of the Code of Virginia. Section 51.1-1112(A) of the Code provides that Long-Term Disability benefits shall commence upon the expiration of the maximum period that an employee is eligible (emphasis added) to receive Short-Term Disability benefits. For me to accept the argument of the Department of Corrections in this matter that the grievant was properly transitioned to Long-Term Disability benefits would require me to find that DHRM Policy 4.57 is inconsistent with the statute and should be ignored. The policy clearly distinguishes between being eligible for benefits and actually receiving those benefits. The latter is specifically stated to be the triggering condition for placing an employee into long-term disability status.

It is well established that a public official is presumed to have acted properly in the discharge of his public duties. United States v. Chemical Foundation, Inc., 272 U.S. 1, 14, 15, (1926). I will presume that the Department of Human Resource Management in drafting Policy 4.57 so acted regularly and consistently with the statutory mandates. In

> accordance with that presumption, I interpret Policy 4.57 as being consistent with the intent of the statute.
>
> The grievant presented evidence that two male employees at the facility were also working with physical disabilities that the agency had accommodated by modifying their duties and allowing them to work eight hour shifts. I do not find that the grievant has presented sufficient evidence with regard to the actual conditions of these employees to establish an "unfair" application of Policy 4.57.[2]

Based on the foregoing, the agency has requested an administrative review by this Department as well as the DHRM.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions … on all matters related to procedural compliance with the grievance procedure."[3] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[4]

At issue here is the hearing officer's interpretation of DHRM Policy 4.57, as applied to the facts and circumstances in the grievant's case. The November 19, 2008 letter from UNUM to the grievant states in relevant part:

> We regret that we cannot consider extending benefits beyond January 13, 2009 unless we receive and review the additional medical information. After completing our review, we will make a determination about extending your benefits. If we do not receive the additional medical information within 21 days of January 13, 2009, we will have to close your file on January 1, 2008. [sic]
>
> Please be advised that your Human Resource department requires that you present a return to work slip signed by your physician on the day that you are released to return to work.

Because the grievant did not present additional medical documentation of her need for continued VSDP benefits (as discussed in paragraph one of the November 19, 2008 letter), the hearing officer concluded that the grievant's STD benefits ended on January 13, 2009. He accordingly reasoned that because the grievant did not receive STD

---

[2] *Id*. at 5-8.
[3] Va. Code § 2.2-1001(2), (3), and (5).
[4] *See Grievance Procedure Manual* § 6.4(3).

benefits for the entire 125 day period established under VSDP policy, the agency violated policy when it transitioned her into LTD. The agency, on the other hand, argues that because the grievant did not present medical documentation from her physician releasing her to return to work "full-time, full duty," the grievant's STD benefits continued beyond January 13, 2009 and ultimately for the entire 125 day period, thereby warranting her transition into LTD status.

In addition, the agency challenges that portion of the hearing officer's decision that concludes: "I cannot find that the grievant was not working full-time full-duty on March 16, 2009."[5] More specifically, the agency argues that because the grievant continued to work an 8-hour day five days a week instead of her pre-disability schedule of alternating working two 12-hour shifts one week and five 12-hours shifts the next, the grievant did not return to her pre-disability job without restrictions prior to March 16, 2009, or indeed, after that date.

Based on the foregoing, we conclude that the agency's challenge is one of policy interpretation. The DHRM Director (or her designee), not this Department, has the authority to interpret all policies affecting state employees, and to assure that hearing decisions are consistent with state and agency policy. Only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state policy. Here, the agency has requested an administrative review by the DHRM Director and as such, the issues discussed above should be addressed by that Department.[6]

CONCLUSION, APPEAL RIGHTS, AND OTHER INFORMATION

For all of the reason set forth above, we will not disturb this decision. However, as noted above, the agency has appealed to the DHRM Director. If the DHRM Director remands the decision to the hearing officer, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[7] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[8]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for

[5] Hearing Decision at 6.
[6] The hearing officer relied, in part, on his conclusion that the grievant's STD benefits ended on January 13, 2009, as a result of the grievant's failure to provide additional medical information to UNUM. This Department notes that according to policy, STD benefits can end under six specific conditions, including failure to "cooperate or comply with the requirements of VSDP." The DHRM Director may wish to consider this section of policy along with the section cited by the agency (return to pre-disability job on a full-time basis without restrictions) in determining whether the hearing decision is consistent with policy.
[7] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[8] *See Grievance Procedure Manual* § 7.2(a).

administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.[9] Thus, if the DHRM decision is not remanded, the decision will become final on the date the DHRM decision is issued.

Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[10] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[11]

_____
Claudia T. Farr
Director

[9] *Grievance Procedure Manual* § 7.2(d).
[10] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[11] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).