Issue: Qualification – Benefits/Leave (VSDP); Ruling Date: December 20, 2011; Ruling No. 2012-3138; Agency: Department of Corrections; Outcome: Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF THE DIRECTOR

In the matter of Department of Corrections
Ruling Number 2012-3138
December 20, 2011

The grievant has requested qualification of his July 17, 2011 grievance with the Department of Corrections (the agency). For the reasons set forth below, this grievance is qualified for hearing.

FACTS

Following an injury, the grievant returned to work full-time, but under a light-duty restriction. According to the grievant, the agency informed him at that time that while it had no light-duty positions for him, he could return to his former position and adhere to restrictions as needed. In short, the grievant states he was told to "make the call" as to whether he could perform a particular task. The grievant was separated from employment after he allegedly completed the full short-term disability (STD) period, after which he effectively rolled into long-term disability working (LTD-W), without being cleared to return to work full-duty. The grievant challenges his separation from employment because he believes that he did not actually work under any of the restrictions his physician had indicated and, therefore, was never working at a light-duty level.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[1] Further, complaints relating solely to the establishment or revision of wages, salaries, position classifications, or general benefits "shall not proceed to a hearing."[2] 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.[3] In this case, the grievant asserts that the agency either misapplied or unfairly applied the Virginia Sickness and Disability Program (VSDP) policy.

[1] Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(C).
[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.

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."[4] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7] 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.

"Long-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."[8] LTD is an "income replacement benefit" paid after the expiration of STD.[9] However, there is also a long-term disability working benefit (LTD-W). LTD-W "allows employees to continue to work for their agencies from STD working status."[10] LTD-W status is in effect when employees "working during STD (modified schedule or with restrictions) continue to work for their agency from STD working status into LTD for 20 hours or more per workweek in their own full-time position."[11]

After the grievant's physician indicated the need for a light-duty restriction, the grievant would have effectively been on STD working (i.e., working with restriction), although presumably without receiving an income supplement benefit as he was allegedly working full-time. After his STD period expired, he would have rolled into LTD-W. Unlike an employee who is out of work on LTD, "[e]mployees in LTD-W are considered employees of the Commonwealth."[12] However, on the other hand, if an employee reaches LTD status, "[r]eturn to pre-disability position is not guaranteed," and "agencies can recruit and fill their pre-disability

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[4] *See Grievance Procedure Manual* § 4.1(b).
[5] 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.
[6] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[8] Va. Code § 51.1-1112(A); *see also* DHRM Policy No. 4.57, VSDP ("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.").
[9] DHRM Policy No. 4.57.
[10] *Id.*
[11] *Id.*
[12] *Id.*

position."[13] An important issue here, therefore, is whether the grievant was actually working in a light-duty, i.e., restricted, status when he returned to work.

The grievant asserts that he did nothing different in his performance of his job than he did before his injury. He climbed ladders, worked in ditches, tunnels, and on roofs, and worked overtime. He states that his only restriction was to one arm and it did not apparently impact his job performance. To rebut, the agency relies upon the physician notes that apparently indicated the need for light-duty. The agency states that the grievant's supervisor was responsible for making sure the grievant did nothing beyond that restriction.

The facts of this case, and indeed the potentially conflicting applications of policy language as to those facts, are clearly in dispute. The grievant presents a reasonable assertion that he was not actually working in a restricted capacity. Consequently, it follows that if the grievant had actually returned to his former position full-time, full-duty, he could not have been considered to be on STD working,[14] and thus could not have rolled into LTD-W or LTD. On the other hand, the agency disputes this contention, stating that the grievant was given a light-duty restriction by his physician and presumably adhered to it on the job.[15] These are precisely the types of factual disputes that are more properly determined by a hearing officer. If the facts are as the grievant states them to be, there is a sufficient question raised as to whether the agency misapplied policy in separating him from employment. As such, this grievance qualifies for a hearing.

This qualification ruling in no way determines that the agency's actions were in fact improper, only that further exploration of the facts by a hearing officer is appropriate. A hearing officer is more properly suited to examine the facts and interpret the policies involved to rule on the grievant's claims.

Alternative Theories and Claims

Because the issue of the grievant's separation qualifies for a hearing, this Department deems it appropriate to send any alternative theories and claims related to his separation for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department concludes that the grievant's July 17, 2011 grievance is qualified. Within five workdays of receipt of this ruling, the agency shall

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[13] *Id.*

[14] *See id.* ("STD benefits end when the employee … is able to perform the essential functions of his or her pre-disability job on a full-time basis."). DHRM Policy 4.57 also defines "disability" as "[a]n illness or injury or other medical condition, including pregnancy, that prevents an employee from performing the duties of his or her job."

[15] *See id.* ("Work arranged through a vocational, rehabilitation, or return-to-work program, where the employee has not been released by his physician full-time/full-duty, does not count towards days worked when determining if a new disability exists. The employee is still considered disabled and on STD.").

request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

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Claudia T. Farr
Director