Issue: Qualification – Benefits/Leave (VSDP); Ruling Date: December 20, 2011; Ruling No. 2012-3143, 2012-3145; Agency: University of Virginia; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF THE DIRECTOR

In the matter of the University of Virginia
Ruling Numbers 2012-3143, 2012-3145
December 20, 2011

The grievant has requested qualification of her September 10, 2010 and October 4, 2010 grievances with the University of Virginia (the University). For the reasons set forth below, these grievances do not qualify for a hearing.

FACTS

The grievant's absence from work due to a medical condition was approved for short-term disability (STD) on March 15, 2010, with benefits commencing on March 22, 2010. Around the same time, the grievant was required to undergo a fitness for duty examination on March 31, 2010. The results of that examination apparently required the grievant to undergo further counseling before she would be permitted to return to work. The grievant disputed that analysis, and did not follow through with the required counseling. As such, although she was apparently released to return to work for purposes of the medical condition for which she originally took STD leave, she was not released to return to work for the reasons found in the fitness for duty examination. As a result, the grievant received the full 125 work days of STD benefits, which expired on September 10, 2010, resulting in her placement on long-term disability (LTD) and separation from employment on September 11, 2010.

The grievant's September 10, 2010 grievance primarily requests an extension of her employment on active duty (instead of being moved into LTD) and seeks to have this time assessed as something other than leave without pay (LWOP). The grievant also requested an unspecified reasonable accommodation under the Americans with Disabilities Act (ADA). The grievant's October 4, 2010 grievance challenges her transition into LTD and resulting separation from employment with the University.[1]

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[2] Further, complaints relating solely to

[1] Although the grievances raise other issues, these were the matters remaining to be addressed in each grievance following EDR Ruling No. 2011-2938.
[2] Va. Code § 2.2-3004(B).

the establishment or revision of wages, salaries, position classifications, or general benefits "shall not proceed to a hearing."[3] 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.[4] In this case, the grievant asserts that the agency misapplied or unfairly applied the Virginia Sickness and Disability Program (VSDP) policy and/or failed to accommodate her disability under the ADA.

VSDP

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."[5] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[6] 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8] 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, short-term disability benefits are provided for a maximum of 125 workdays.[9] "[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."[10] LTD is an "income replacement benefit" paid after the expiration of STD.[11] 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."[12]

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[3] Va. Code § 2.2-3004(C).
[4] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.
[5] *See Grievance Procedure Manual* § 4.1(b).
[6] 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.
[7] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[9] Va. Code § 51.1-1110(B); *see also* DHRM Policy No. 4.57.
[10] Va. Code § 51.1-1112(A); *see also* DHRM Policy No. 4.57.
[11] DHRM Policy No. 4.57.
[12] DHRM Policy No. 4.57.

The grievant's receipt of STD benefits began on March 22, 2010 and continued to September 10, 2010, whereupon, she rolled into LTD. There does not appear to be any misapplication of policy with regard to this calculation. 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.*[13] There is no evidence in this case that the agency agreed to hold the grievant's position open. Accordingly, the grievant has not presented evidence to support her position that the agency violated any mandatory VSDP policy provision when she was moved into LTD, effectively separating her from employment with the Commonwealth. Further, the grievant's requests in her September 10, 2010 grievance to have her active employment extended without LWOP would not appear to be possible under the terms of the VSDP Policy.[14] Consequently, the agency's denial of her request is not a misapplication or unfair application of policy. The grievant's VSDP claims do not qualify for a hearing.

Failure to Accommodate

DHRM Policy 2.05 "[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, age, veteran status, political affiliation, genetics or *disability*."[15] Under DHRM Policy 2.05, "'disability' is defined in accordance with the 'Americans with Disabilities Amendments Act' [sic]," the relevant law governing disability accommodations.[16] As a general rule, if an employee is disabled under the ADA, an employer must make "reasonable accommodations" unless the employer can demonstrate that the accommodation "would impose an undue hardship on the operation of the business [or government]."[17]

The documentation submitted by the grievant in connection with her grievance does not raise a sufficient question as to whether she was entitled to some unspecified reasonable accommodation. Further, it is not clear how the agency's alleged failure to provide any such unspecified accommodation would have prevented the grievant's placement on LTD and separation from employment in this case. The grievant continued on STD because she did not follow through with counseling requirements following a fitness for duty examination. Consequently, this grievance fails to raise a sufficient question as to whether the agency violated the reasonable accommodation provisions of the ADA and/or related policy such that the grievant would be returned to active employment. The grievant's ADA-related claims do not qualify for a hearing.

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[13] *See* EDR Ruling No. 2006-1334.
[14] *See* DHRM Policy No. 4.57.
[15] DHRM Policy 2.05, *Equal Employment Opportunity*.
[16] 42 U.S.C. §§ 12101 *et seq.*
[17] 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.").

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