Issue: Qualification -- Benefits/Leave (VSDP); Ruling Date: February 15, 2012; Ruling No.2012-3222; Agency: Department of Corrections; Outcome: Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF THE DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2012-3222
February 15, 2012

The grievant has requested qualification of her October 20, 2011 grievance with the Department of Corrections (the agency). For the reasons set forth below, this grievance qualifies for a hearing.

FACTS

The grievant's absence from work due to a medical condition was approved for short-term disability (STD) through October 19, 2011. The grievant's physician released her to return to work beginning October 20, 2011. The physician's work release letter, dated October 17, 2011, includes language indicating that the grievant was released "provided that she is not placed in another work environment that is hostile or abusive." The agency interpreted the physician's letter as returning the grievant to work, but with restrictions.

The grievant arrived for work on October 20, 2011, but was turned away. The agency considered the grievant to have rolled into long-term disability (LTD) and was effectively separated from employment. The grievant states that she was previously told by an employee of the Third Party Administrator (TPA) that she needed to report to work on October 20, 2011 because her STD period was ending October 19, 2011. The grievant has filed her grievance to challenge her separation from employment.

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

[1] Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(C).

agency misapplied or unfairly applied policy, or discrimination, retaliation or discipline improperly influenced the decision.[3] In this case, the grievant asserts, for example, that the agency misapplied and/or unfairly applied the Virginia Sickness and Disability Program (VSDP) policy and that she has been retaliated against because of her prior grievance activity.

Misapplication and/or Unfair Application of 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."[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.

By statute and under the VSDP Policy, short-term disability benefits are provided for a maximum of 125 workdays.[8] "[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."[9] LTD is an "income replacement benefit" paid after the expiration of STD.[10] 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."[11] LTD status is in effect when an "[e]mployee has received the maximum STD benefit and is unable to [return to work]."[12]

There is no dispute that the grievant received the full 125 days of STD benefits. The questions in this case include whether the agency could properly consider the grievant as unable

[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.
[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 § 51.1-1110(B); *see also* DHRM Policy No. 4.57.
[9] Va. Code § 51.1-1112(A); *see also* DHRM Policy No. 4.57.
[10] DHRM Policy No. 4.57.
[11] *Id*.
[12] *Id.*

to return to work, and thus in an LTD status (in other words, separated) even though she returned to work on the day immediately following the 125th day of STD benefits. Once an employee is moved into LTD, the employee is not considered an active 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] which the agency did not agree to do in this case. As such, even though the result is harsh, the agency does not appear to violate a mandatory policy provision by separating an employee who arrives to work, released by a physician, on the 126th day. However, the inquiry in this case does not end here.

The grievant maintains that she was told by the TPA that she needed to report for work on October 20, 2011, because her STD benefits ended on October 19, 2011. Assuming the grievant was provided this representation by the TPA, it is arguably not appropriate for the consequences of not arriving for work on October 19th to fall on the grievant when she followed the instructions of the TPA. Thus, this grievance raises a sufficient question as to whether policy was unfairly applied in her case. Consequently, the grievance must be qualified for a hearing for further exploration of the facts.

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. Indeed, the hearing officer will need to assess the facts and their application to policy as to a multitude of issues, any one of which may result in a finding against the grievant.[14] However, a hearing officer is more properly suited to examine the facts and interpret the policies involved in order 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 her 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 October 20, 2011 grievance is qualified for a hearing. Within five workdays of receipt of this ruling, the

[13] *See* EDR Ruling No. 2006-1334.

[14] For example, the agency has taken the position that the work release submitted by the grievant's physician was not a full-time/full-duty release because it contained restrictions. However, reasonable minds could disagree as to the effect and meaning of the physician's letter. While the letter contains language that conditioned the grievant's return to work to a degree, the language does not appear to address the grievant's inability to perform the essential functions of her job, which is a consideration under the VSDP Policy in determining whether the grievant was under a "disability." *See* DHRM Policy 4.57.

agency shall 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