Issue: Qualification – Benefits/Leave (VSDP); Ruling Date: May 9, 2012; Ruling No. 2012-3316; Agency: Department of Corrections; Outcome: Qualified for Hearing.

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

# QUALIFICATION RULING OF THE DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2012-3316
May 9, 2012

The grievant has requested qualification of her September 23, 2011 grievance with the Department of Corrections (the agency). For the reasons set forth below, this grievance is qualified for hearing.

## FACTS

The grievant's son passed away in February 2011. Shortly after the funeral, a co-worker allegedly made insensitive remarks to the grievant about her son. Afterwards, the grievant went out for a period of short-term disability (STD), beginning in March 2011. On April 20, 2011, the grievant returned to work with a full-time, full-duty release by her physician. Upon her return, the grievant sought to move to day shift (the grievant was previously on night shift) so that she did not work on the same shift as the co-worker who made the alleged insensitive comments. A 60-day agreement was entered into between a manager and the grievant to effectuate the transfer for "personal reasons."

In July 2011, the grievant had need for an extended medical leave again and was out of work beginning on or around July 9, 2011. After this need for leave arose, a member of the agency's human resources staff reportedly contacted the third-party administrator to indicate that the agency had been accommodating the grievant after her return to work in April. Consequently, the third-party administrator considered the grievant's STD period beginning in July as a continuation of the earlier STD leave instead of a new period. As such, the grievant's income replacement benefit under STD was reduced from the level it would have been if it was a new period of disability.[1] The grievant has grieved this situation, seeking reinstatement of the leave she lost to cover the period of disability that extended from July 11, 2011 to August 19, 2011.

[1] *See* DHRM Policy 4.57, *Virginia Sickness and Disability Program.*

## 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 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 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."[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 the grievant lost leave she would not have had to use (if she is correct in her claims) it will be assumed, for purposes of this ruling only, that the grievant experienced an adverse employment action.

The situation in this case implicates the successive periods of disability provisions of the VSDP. If an employee returns to work from STD with a full release and later must go out for the same condition within 45 calendar days, the second period will be considered a continuation of the first period of STD.[9] In this case, the grievant was at work for longer than 45 days following her return to work in April 2011. As such, her need for leave beginning in July 2011 would ordinarily be considered a new period of disability. However, when the agency moved her to day shift, it apparently considered the transfer an accommodation, making the grievant's return to work "restricted" instead of a full-time, full-duty release. Therefore, the outcome of this case

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[2] Va. Code § 2.2-3004(B).
[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] VSDP Handbook, 2012 Addendum, at 18.

depends on whether the grievant was considered to have returned to work full-time, full-duty in April 2011. For multiple reasons, the grievance raises a sufficient question as to whether or not the grievant returned to work under a restriction that would implicate the VSDP as the agency claims.

There is no indication that a request for a restriction to day shift was made by the grievant's physician in April 2011.[10] Rather, the transfer to day shift was purportedly to voluntarily accommodate the grievant's request not to have to work with another agency employee who made an insensitive comment to the grievant about her deceased son. Consequently, one reasonable conclusion, based on the grievant's assertions, is that this transfer was for personnel concerns, not medical. This transfer appears similar to transferring an employee away from a harassing supervisor, rather than addressing it as a medical issue of the harassed employee. As such, it is unclear how such an "accommodation" qualifies as a medical restriction under the VSDP such as to render the grievant's status as STD-Working.

In addition, under the DHRM policy, STD ends when the employee "is able to perform the essential functions of his or her pre-disability job on a full-time basis."[11] This Department has not reviewed any evidence that the grievant's physician indicated there was any restriction on the grievant such that she was unable to perform any function of her job in April 2011. Indeed, also referencing the employer's VSDP manual, which is published by the Virginia Retirement System, an employee is considered returned to work full-time, full-duty *even if there are restrictions on the employee's return* as long as those restrictions do not affect the essential job functions (as determined by the agency).[12] Again, this Department has not reviewed any indication that the grievant's ability to complete her essential job functions was so restricted by her physician.

In conclusion, in this Department's determination, there is a sufficient question raised by the grievance as to whether the grievant's return to work in April 2011 was and should have been considered full-time, full-duty, based on the facts available at this time. If the evidence supports that conclusion, the grievant's period of STD in July/August 2011 should have been considered a new period of disability with higher income replacement benefits provided rather than the grievant having to use additional leave to cover her absence.[13] 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

[10] It appears that a request from the grievant's physician that she remain on day shift was made on July 1, 2011 and again on August 1, 2011. However, even if those would be considered restrictions or requests for accommodation at that time, the grievant had already been returned to work for longer than the 45 days by July 1, 2011.
[11] DHRM Policy 4.57.
[12] VSDP Employer Manual, April 2012, Ch. 5, at 21.
[13] It would appear that if the grievant is successful in her claim at hearing, the remedy for this situation is a reinstatement of the leave lost during that absence, with due consideration of and accounting for the seven day waiting period. *See* DHRM Policy 4.57. If the parties come to a resolution prior to hearing on restoring the grievant's leave, there may be little need for a hearing on this matter.

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 misapplication of policy claim qualifies for a hearing, this Department deems it appropriate to send any alternative theories and claims related to this matter and raised in the grievance 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 September 23, 2011 grievance is qualified. Within five workdays of receipt of this ruling, the 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