Issue: Compliance/grievance procedure/30-day rule; Ruling Date: February 22, 2006; Ruling #2006-1273; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: grievance is in compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
COMPLIANCE RULING OF THE DIRECTOR

In the matter of Department of Mental Health, Mental Retardation and Substance Abuse Services
No. 2006-1273
February 22, 2006

The agency has requested that this Department reconsider its Ruling No. 2006-1187, issued on January 30, 2006. For the reasons set forth below this Department will not disturb its earlier compliance determination that the grievance was timely filed.

FACTS

The grievant was employed as an Administrative Assistant. As a result of a serious health condition, she went into Short Term Disability (STD) in May of 2004 and was placed into Long-Term Disability (LTD) in February of 2005. The agency sent the grievant a letter on February 16, 2005, describing how her benefits, insurance, retirement contributions and leave were affected by her "long-term disability separation."

The grievant asserts that she was released to return to work by her physician after Labor Day. On September 2, 2005, the grievant spoke with her immediate supervisor about coming back to work. She claims that she was referred to the Human Resource Office and finally to the Director of Facility Operations, who informed her that for budgetary reasons, her position had been abolished.

On September 16, 2005, the grievant wrote the Deputy Commissioner of Facility Operations to discuss the possibility of coming back to work with the agency. She asserts that she received a response, dated September 28, 2005, confirming that her position had been abolished. In addition, the September 28th letter explained that under the Virginia Sickness and Disability Program (VSDP), employees who transition into LTD are separated from service. The letter also informed the grievant that when a LTD employee is released to return to work, the employee may seek re-employment through the competitive process. The letter concluded by encouraging the grievant to "apply for any position for which you feel you are qualified in order that you may be considered for re-employment."

This Department held that the grievance was timely because while the February 16, 2005 letter made reference to "separation," the letter did not clearly and unambiguously

inform the grievant that her employment with the Commonwealth had ended as a result of her movement into LTD and the agency's decision not to hold her position open.

DISCUSSION

This Department reconsiders its compliance rulings as a matter of discretion, not right. When, as in this case, a compliance issue may be further clarified, we will respond to the concerns of the requesting party. The issue of "notice" of employment status in VSDP cases has been the subject of several recent rulings. Accordingly, under the particular facts of this case, this Department deems it appropriate to respond to the concerns raised by the agency in its reconsideration request.[1]

Adequate Notice of Cessation of Employment

The agency states that it "provided appropriate notice of separation from employment" in the February 16th letter. The agency points to the first sentence of that letter which reads "[t]he following paragraphs describe how your health benefits, life insurance, retirement contributions and leave are affected upon your long-term disability separation."

As this Department recognized in Ruling No. 2006-1187, while the February 16th letter made several references to "separation," the letter did not unequivocally state to the grievant that her employment with the Commonwealth had terminated as a result of her movement into LTD. While the sentence to which the agency references indeed provided the grievant with notice that she had suffered a "long-term disability separation," that statement did not unambiguously inform the grievant that her employment had ended.[2]

One of the primary problems with merely informing an employee that she has experienced a "long-term disability separation" is that such a term does not appear in the state policies that an employee would ordinarily review for clarification of what that term means. For example, the Department of Human Resource Management (DHRM) Policy 1.70, the

[1] EDR compliance rulings are final and nonappealable; accordingly, as it seems appropriate under the grievance procedure, EDR may exercise its discretion to grant a compliance ruling reconsideration. Only in extraordinary circumstances, however, will EDR reconsider its qualification or access rulings. Grievants may appeal both access and qualification denials to the circuit court in the jurisdiction in which the grievance arose. *Grievance Procedure Manual, §§2.3 and 4.4, respectively.* In addition, either party to a grievance may appeal a final hearing decision (which incorporates any administrative review decisions) to the circuit court on the basis that the final hearing decision is contradictory to law. *Grievance Procedure Manual, §7.3(a).* It should be noted, however, that for purposes of grievance procedure compliance, DHRM and EDR cannot reconsider their administrative review rulings because "if the administrative review process were open-ended, allowing for multiple (revised) opinions, the judicial appellate process would be derailed through the loss of a clear, defined point at which hearing decisions becomes final and ripe for judicial appeal." EDR Ruling No. 2004-859.

[2] As we pointed out in Ruling No. 2006-1187, what the grievant could expect in terms of the probability or even possibility of continued employment was not clearly explained. The February 16th letter states that "[d]ue to your long-term disability status, the agency is not under any obligation to hold onto the position you currently held." This language, while accurate, does not unambiguously inform the grievant that the agency has elected not to hold the grievant's position open, only that it has no obligation to hold the position open.

Termination/Separation from State Service policy, describes ways that employment can end as: (1) resignation; (2) retirement; (3) discharge; (4) separation-layoff; and (5) separation-leave without pay/layoff. "Long-term disability separation" is not mentioned.[3] Likewise, DHRM Policy 4.57 provides limited guidance on "separation." That policy provides that "[e]mployees are separated in PMIS (PSE139) when they are released by their LTP to return to full-time/full-duty without restrictions and their pre-disability positions are no longer available." For someone not familiar with "PMIS," this provision may not provide significant clarification regarding employment status.[4] Even more significant, Policy 4.57 goes on to state that "[e]mployees in LTD are considered to be inactive employees of the Commonwealth." The term "inactive employee" does not, by itself, provide unequivocal notice to employees that their employment has ended. To the contrary, "inactive" could reasonably be read to suggest that at some point the employee will become active, assuming former or other duties.

For purposes of triggering the grievance procedure's 30 calendar day time period for filing a grievance, merely informing an employee that her position has not been held open does not provide her with adequate notice that her employment has ended. Although DHRM considers such an employee separated from state service when she moves into LTD, unambiguous notice that her employment has terminated is required to ascertain when the employee "knew or should have known" that her employment was terminated, if the agency intends to challenge LTD separation grievances on the basis of untimeliness.

In this case, the agency first provided unambiguous notice that the grievant's employment with the Commonwealth had ended in the September 28, 2005 letter from the Deputy Commissioner of the Facility. That letter expressly informed the grievant that employees who transition into LTD are separated from service. But more importantly, the letter instructed that once an LTD employee is released to return to work, the employee "may seek *re-employmen*t through the competitive process." (Emphasis added). The letter went on to encourage the grievant to "apply for any position for which you feel you are qualified in order that you may be considered for *re-employment*." (Emphasis added). From the perspective of grievance procedure compliance only, the separation language coupled with the "re-employment" language provides the grievant, for the first time, with adequate notice that her employment with the Commonwealth had ceased. Then, and only then, did the 30-day grievance timeframe begin to run. As we pointed out in Ruling 2006-1187, if the February 16, 2005 letter had contained this same language, the grievance would have been untimely.

The critical point is that the grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date she knew or should have known of the event or action that is the basis of the grievance.[5] Until the agency clearly

[3] The agency notes that the DHRM Policy Glossary defines separation as "an employee's discontinuance of state employment, for reasons including discharge, resignation, military duty, or the lapse of a period leave without pay-layoff." Like Policy 1.70, the Glossary makes no mention of a "long-term disability separation."
[4] PMIS is the Commonwealth's Personnel Management Information System.
[5] Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4(1).

informs an employee that her employment with the Commonwealth has ended due to movement into LTD, the employee cannot be deemed to know of the event that forms the basis of her grievance—her separation from employment. To avoid having to deal with grievances initiated long after an employee has moved into LTD, an agency need only (1) inform the employee, clearly and unambiguously, when she moves into LTD whether her position is being held open, and if the position is not being held open, (2) notify the employee that her employment with the Commonwealth has ended as a consequence of moving into LTD.

"Date Grievance Occurred"

The agency points out that the grievant indicated on her Grievance Form A that the "Date Grievance Occurred" was September 5, 2005. The grievance was initiated on October 14, 2005, which the agency points out is more than 30 calendar days beyond September 5th.

This Department believes that the grievance is fairly read as a challenge to the grievant's loss of her employment as a result of having moved into LTD. September 5th was the date that the grievant planned to return to work. However, because the grievance is fairly read as a challenge to her employment loss, and because the employment loss was first unambiguously disclosed to the grievant through the September 28, 2005 letter from the Deputy Commissioner of the Facility, the grievance was timely initiated.

This Department's rulings on matters of compliance are final and nonappealable.[6]

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Claudia T. Farr
Director

[6] *See* Va. Code § 2.2-1001(5).