

Issue: Group II Written Notice with termination (due to accumulation) (failure to perform assigned work and failure to comply with established written policy); Hearing Date: 05/10/06; Decision Issued: 05/18/06; Agency: DMHMRSAS; AHO: Harmon D. Maxson, Esq.; Case No. 8311; Outcome: Employee granted full relief; **Administrative Review: HO Reconsideration Request received 05/31/06; Reconsideration Decision issued 06/06/06; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request on Reconsideration Decision received 06/12/06; EDR Ruling issued 06/26/06 [2006-1370, 2006-1379]; Outcome: HO's decision affirmed; Administrative Review: DHRM Ruling Request received 05/31/06; DHRM Ruling issued 11/07/06; Outcome: HO's decision affirmed;**

COMMONWEALTH of VIRGINIA

Department of Mental Health, Mental Retardation and Substance Abuse Services

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 8311

Hearing Date: May 10, 2006

Decision Issued: May 18, 2006

APPEARANCES

Grievant (also testified as witness)

Grievant's Counsel

Agency Contact Person

Agency Representative (advocate)

Agency Acting Facility Director (also testified as witness)

Other Agency Employee Witnesses:

Psychiatrist

Risk Manager

Child Adolescent Clinical Nurse Specialist and Mentor to Grievant

Clinical Nurse Specialist (primary nurse)

ISSUES

During a pre hearing conference on March 22, 2006, and again at the outset of the hearing the parties agreed on the first three of the following issues.

1. On 12/22/05 did grievant (as an agency nurse) prepare Risperdal 2 mg. for a child patient when the Medication Administration Record (MAR) was for 0.5 mg., thus failing to comply with safe procedure and jeopardizing the safety of the patient (and if so what discipline is appropriate)?
2. The second step response raises the following two charges which appear to be subsumed in the above issues:
 - a. Not giving discharge medications as ordered;
 - b. Medication administration error.
 - c. The second step response also charges: Falsifying documentation on MAR.

The hearing officer opined at the pre hearing conference, and confirms here that since these three charges were not raised in the initial 12/28/05 Group II Written Notice, they should not be brought in through the back door of the second step response, and hence are Not in Issue. The parties concur.

3. Propriety of Removal (Termination or Discharge) based on the initial 12/28/05 Group II Written Notice and two prior active Group I Written Notices.

The hearing officer raised this issue at the 03/22-06 pre hearing conference. At that time the agency representative conceded that there is no policy or precedent for Discharge based on one Group II and two prior, active Group I Written Notices; that such Discharge would be a misapplication of the Standards of Conduct and Policy and would not be qualified; but that she was sure there must be another active Group I Written Notice. No such Written Notice was found.

In an effort to correct this dilemma, on April 17, 2006 nearly a quarter of a year after the initial 12/28/05 Group II Written Notice was issued, the agency issued a second Group II Written Notice backdated with a December 28, 2005 Issuance Date, disciplining grievant not with removal or discharge, but with ten days suspension (without pay) from December 28, 2005 through January 10, 2006, and directing her to return to work on 01/11/06, a patent impossibility. This written notice is in the record as Hearing Officer Exhibit 5. It was transmitted to grievant by an April 17, 2006 letter which also notified grievant that a Group III Written Notice with termination was pending. The letter is in the record as H.O. EX. 4.

Both documents were received by grievant on 04/18/06.¹

4. At the outset of the hearing the issue arose as to which of the two Group II Written Notices was the subject of the hearing. The agency representative contended that the second, backdated Notice was to be considered. The hearing officer rejected that contention and ruled that only the initial Group II Written Notice and ensuing grievance were the subject of the hearing. Grievant's counsel concurred.
5. However the hearing officer stated that he would consider the second back dated Group II Written Notice as a collateral, ancillary matter and decide the issue of whether it had any legal force and effect or provided due process. At the hearing he stated his negative opinion on this issue, which is detailed in the opinion portion of this decision.

¹ On 04/26/05 grievant received a Group III Written Notice with termination. She has grieved both the revised, backdated Group II and the Group III Written Notices, but these grievances are not a part of this proceeding.

FINDINGS OF FACT

Grievant was employed as an agency nurse (RN) for approximately one² or two³ years. She was assigned to the facility Unit 2 to dispense medications to patients. Agency Exhibit 7 contains grievant's work Description and Performance Plan.

The agency psychiatrist testified that Unit 2 contains children from ages 3 to 14 with average ages of 8, 9, 10 and 11. Those kids are less able to let a nurse know if they think they are not getting the right medication.

The agency Risk Manager reviews medication errors and looks for a pattern with the nurse and unit involved. During July—September 2005 there were eight errors, one of which was a grievant's. From October—December 2005 there were 21 errors of which 12 (58%) were grievant's. Agency Ex. 6 contains 6 Medication Variance Reports detailing grievant's errors from 10/17/05 through 11/16/05. They include wrong dosage, failure to document administration on MAR (Medication Administration Report), omission(overlooked/forgot to give), order not noted on physician order, order not placed on MAR and not faxed, order to discontinue not checked resulting in med being given for four extra days, and order transcribed inaccurately to MAR.

Pages 3 and 4 of Agency Ex. 1 contain a 11/10/05 report by the Risk Manager relating incidents during the several preceding days in which grievant related to her that grievant was on a 2-week trial with no med errors, but had made several med errors and was fearful of losing her job. The report summarizes 6 areas of grievant's deficiencies, including not being truthful when questioned about what she wrote on the MAR. It concludes that grievant had difficulty accepting responsibility for her actions, does not realize the seriousness of the situation, is creating an unsafe work environment, does not use the prudent skills a competent nurse would, and does not always comply with policies and procedures.

Page 2 of Agency Ex. 1 is a report of an 11/10/05 meeting by grievant and 4 members of the agency staff concerning her judgments, and patient safety in dispensing meds. The meeting was called due to concerns of the Risk Manager and the psychiatrist over her ability to perform nursing duties. Grievant admitted giving only ½ a dose of Concerta ordered on 11/09/2005. The psychiatrist requested she be removed from Unit 2 and her schedule was changed to reflect her assignment off of Unit 2. The psychiatrist testified at the 04/10/06 hearing that he'd had concerns for some time over grievant's confusion over medication errors of various sorts including transcribing and distributing meds and that she was the only nurse he ever requested be removed from Unit 2, and that no other nurse had her number of mistakes and her persistence of mistakes.

² Testimony of Risk Manager

³ Grievant's testimony

On 11/15/05 grievant was issued a Group I Written Notice for unsatisfactory work performance, and non-compliance with policies and procedures, noting that she was counseled on 10/24/05 and 11/04/05. Agency Ex. 1, p. 1.

On 11/15/05 grievant was issued a second Group I Written Notice for reporting to work late that day and for substandard performance, needed improvement, and unsatisfactory attendance. Support documents list late to work on 09/18/05, appearing confused and disoriented, leaving after one hour without permission, and taking a day of sick leave to celebrate her daughter's birthday. She called in at 1: 20 a.m. and left a message that she would not be in but did not talk with another RN as required. Grievant did not provide an MD excuse for 48 hours she did not report to work. Grievant had been counseled on attendance and need to "work off" unscheduled time and not to be on "lost time" and to review policies and procedures. On 10/24/05 she had been given a Notice of Improvement Needed/Substandard Performance, listing 4 areas of needed improvement and outlining an Improvement Plan. Agency Ex. 2.

The Acting Facility Director testified that neither of the above Group I Written Notices were contested by grievant because she was told that she could not grieve them. Grievant confirmed this.

The RN Manager (himself an RN) reviewed and detailed 9 of grievant's medication errors in an 11/15/05 memo to the Nurse Executive Director. Agency Ex. 5, p. 1. He related that grievant worked "hap-hazardless" on every unit, and continued to struggle with basic nursing duties of dispensing medications, continued to make multiple errors and was a danger.

On 11/15/05 the Nurse Executive Director assigned the Child Adolescent Clinical Nurse Specialist to mentor grievant in the proper procedures for 6 areas of her duties including giving out medications, transcribing medications, re-writing the MAR, etc. and whatever else he felt she might need to review. Agency Ex. 5, p. 2.

The Clinical Nurse Specialist testified that he had never been given such an assignment before in his 16 years as a nurse, and that it definitely was not normal procedure. He met with grievant a number of times in the next several weeks and went over all basic nursing education: right patient, right drugs, etc. He helped her develop a structured procedure and plan for medication administration and records, transcribing orders, etc. Agency Ex. 5 contains his 11/28/05 progress report and suggested steps for taking off orders. The last page of the exhibit is an 11/30/05 e-mail from the Nurse Executive Director reporting that grievant had completely ignored a child's 7 a.m. medication and wondering if grievant should be allowed to continue to work there as a full time RN.

On 12/28/05 the Nurse Executive Director issued grievant a Group II Written Notice with "Removal" effective 12/28/05. That notice and the resultant grievance are the subject of this preceding. The notice charges that:

On the morning of 12/22/05 grievant was assigned to Unit 2. She prepared to give a patient his a.m. dose of Risperdal and had the primary nurse check the MAR for correct dosage. Grievant prepared Risperdal 2. The order is for 0.5 mg. This is 4 x the amount ordered. Grievant did not comply with the safe practice of giving medications and she jeopardized the safety of the patient. (Agency Ex. 3)

Four backup documents are submitted as part of Agency Ex. 3. The first is a 12/22/05 memo from RN Manager I to the Nurse Executive Director relating that on 12/22/05 the psychiatrist stated that due to grievant's continuing multitude of medication errors she should not work in the children's unit. His new issues of concern included a seclusion incident in his unit on the morning of 12/22/05, of which he was not informed. No exclusion order was written at the time. Grievant thought the order would be written on the second shift and it was. The psychiatrist testified at the hearing that seclusion is restrictive intervention: when a child went out of control, and became potentially aggressive and could injure himself he was put in a locked room under watch. The memo also relates two medication errors on 12/22/05 in which grievant allegedly put 50 mg. of Zoloft in a cup instead of the correct dose of 75 mg. and allegedly put 2 mg. of Risperdal in a cup instead of 0.5 mg. The medications were not given and grievant allegedly said she would have caught the error prior to dispensing.

The second backup document 12/27/05 is a Notice of Improvement Needed/Substandard Performance document by the Nurse Executive Director. It relates the Zoloft and Risperdal errors and failure to timely report the seclusion on 12/22/05. These are characterized as a "failure to perform assigned work and comply with established written policies ... And a violation of a safety rule where there is not a threat of bodily harm". It recommends that grievant be terminated for continued substandard performance.

The third backup document is a 12/21/05 Interim Evaluation Form reporting an order for Epsom Salt B.I.D. was inaccurately placed on MAR prm by grievant.

The fourth backup document is a 12/20/05 memo, apparently from another nurse to the Nurse Executive Director concerning a lack of communication mix up between her and grievant and failure by grievant to write another exclusion order or "pink sheets".

In writing the Group II Written Notice, the Nurse Executive Director failed to mention the Zoloft and Epsom Salt errors, or the exclusion order incident, and neglected to follow her own offense characterization and termination recommendation in the second backup document.

Grievant filed a timely Grievance Form A on 12/24/05. Agency Ex. 4. Therein she listed 8 "issues" to her dismissal, including issues of harassment and hostile work environment, which were not qualified for hearing. Only the issuance of a Group II Written Notice with Termination qualified for hearing. Grievant challenged the dismissal for lack of evidence supporting the accusations which led to her dismissal, and alleged

she was terminated without just cause and unjustly according to Personal Policies and Procedures.

Several of her “issues” including “substandard teaching”, and “Fabrication of a so called mentorship”, appear frivolous and without basis and were not pursued.

As evidenced by Grievance Form B, Appointment of Hearing Officer, this is the grievance which this hearing officer was appointed to hear. See H.O. Ex. 7.

Grievant states as follows. On 12/22/05 she and the primary nurse were assigned to Unit 2. Grievant came to the unit at 7:15 a.m. She couldn't find the primary nurse. Grievant went to the med room and signed off. Each unit has an MAR with the patient's picture, date of birth, allergies, etc. The M.D. orders the meds and the RNs administer them. Each patient's meds are logged on the MAR with the scheduled time and dose. When a nurse gives the med she initials the MAR.

There is a locked drawer for each patient, containing a week's supply of blister packed meds. The drawer is labeled with the patient's name. When she opened one drawer she found therein a plastic cup containing packaged meds. She didn't know who had pulled those meds. She did not check to see what they were, but instead pushed them to the back of the drawer and pulled the prescribed med from the blister pack and put it in a plastic med cup in the front of the drawer. The order was for Risperdal .5 mg. They had on hand only Risperdal 1 mg. so she wrote on the back “1/2”. Since the primary nurse was not present, grievant could not ask her about the second cup of already pulled meds, and contrary to the charge in the Written Notice, did not have the primary nurse check the MAR for correct dosage. At the most, grievant had only pulled 1 mg of Risperdal, not the 2 mg charged in the Written Notice. ⁴

Grievant has found other cups of medicine in patient's med drawers. She pushes them in back. They may be from an evening dose not given. If she has time she can check the chart for other meds not given. On 12/22/05 she didn't have time.

Grievant administers meds either when the child comes to her or she goes to the child in the day area where children eat breakfast.

At some point the primary nurse entered the med room. Grievant did not recall talking to her but stated the last she saw of her was the back of her head as the primary nurse was going out the door presumably to report the Risperdal 2 mg. Grievant assumed the primary nurse dumped both cups of Risperdal together and took them to the psychiatrist. She did not know why the primary nurse did not talk to her about it and allow her to correct any problem. She had had problems with the primary nurse.

⁴ The second, revised and backdated Group II Written Notice states: Had the primary nurse not observed and stopped you from incorrect medication severe harm could have come to the patient. H.O. Ex 5. Grievant states that the primary nurse was not there to observe or stop her.

Apparently the primary nurse reported the Risperdal incident to the psychiatrist who informed the RN Manager I who talked to grievant about one cup of Risperdal with 4 x the ordered amounts. Grievant told him she had been set up.

The primary nurse was called as a rebuttal witness. Although she stated that she got along alright with grievant, she appeared a bit petulant or reserved and reticent to say she got along alright with grievant. On 12/28/05 she began her shift at 6:45 a.m. “doing behavior” and went to the med room about 8 a.m. to administer meds. She initially didn’t know grievant had been pulling meds. She found meds in the drawers including Risperdal in a dosage more than it should have been. She didn’t remember 2 cups but admitted there could have been. She stated that the normal procedure if she opens a drawer and finds med is to dump it down the sink, and if medicine is left from a prior shift it is dumped in the sink. Conversely she testified that if meds are already in a drawer she investigates and asks the person she’s working with, “if you can find them”.

She indicated somewhat petulantly that grievant could have contacted her by walky talky or overhead paging.

Asked if there was anything wrong with grievant pulling meds, she stated that there were problems on the floor and the psychiatrist didn’t want grievant giving meds. With a hint of animus she said, “I recall asking grievant why she was setting up meds because I knew she wasn’t supposed to and I asked her about the Risperdal.” She stated that the Nurse Executive Director had told her that grievant was not supposed to give any meds. Apparently she had not been informed of grievant’s reassignment to the unit.

She stated she had no reason to set grievant up, and that she reports an overdose to the RN Manager I and to the psychiatrist, and thinks she said something to grievant. She denied dumping the 2 cups together, didn’t think she took the med to the psychiatrist, but just reported it. Later she checked the charts to see if there was an entry by a Dr. increasing the order.

The psychiatrist had no personal knowledge of the Risperdal incident.

There are no mitigating circumstances.

Grievant requests the following RELIEF:

- (1) Reinstatement;
- (2) Back pay (including holiday pay);
- (3) Reinstatement of benefits: insurance, leave, etc.;
- (4) Reinstatement to day shift;
- (5) Back payment of cost of medications which would have been covered by lost insurance. The hearing officer opined at the pre hearing conference that this would constitute damages and is not available. See Grievance Procedural

Manual p. 14, § 5.9 (b). At the hearing the parties agreed with this statement of requested relief.

No relief has been granted to date.

The parties STIPULATE and the hearing officer finds that Removal under the initial Group II Written Order of 12/28/05 was not supported by policy or precedent and was a misapplication of the Standards of Conduct and Policy, since it was supported by only two Active Group I Written Notices.

Grievant's counsel voiced the following MOTION: The agency submitted no proof at all of the 11/22/05 Risperdal incident. The Written Notice is not evidence; it is the equivalent of an indictment. Therefore grievant asks that the Group II Written Notice of 12/28/05 be dismissed.

IN his closing statement he asked that grievant be reinstated from 12/28/05 to 04/17/06⁵ when she got a Group III Written Notice.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code§ 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2, 2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁶

⁵ Grievant actually received the Group III on 04/26/05.

⁶ Grievance Procedure Manuel, § 5.8. Effective date: August 30, 2004.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.2 of the Commonwealth of Virginia's Department of Personnel and Training Manual Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature and are such that an accumulation of two group II offenses normally should warrant removal from employment. Similarly termination can result from four Group I Written Notices or one Group III Written Notice.

In this case the two Group I Notices and one Group II Notices are equivalent to three Group I Notices and do not sustain Termination. The Standards of Conduct § VII D. 2.a. provides that normal disciplinary action for a Group II Written Notice is up to 10 days suspension without pay.

Va. Code § 2.2-303F. specifies that all time limitations prescribed in the grievance procedure including submission of an initial complaint shall be reasonable, specific, and equally applicable to the agency and employee.

The Standards of Conduct § VI provides that the agency should use corrective action as soon as the supervisor becomes aware of unsatisfactory performance; and § VII states that management should issue a Written Notice as soon as possible after the offense.

The terms Removal, Terminated, and Dismissal are used variously throughout this proceeding. A review of the Virginia Personnel Act and the Standards of Conduct does not show that these are words of art with special legal significance. Rather they are used interchangeably and synonymously and as used, evidence that grievant was fired on 12/28/05.

This is a case where the agency appears to have had ample evidence and grounds to terminate grievant and to have issued numerous Group I and Group II Written Notices that cumulatively would justify her termination, or a Group III that would have justified termination. Instead the agency counseled grievant about numerous instances of substandard performance and assigned a mentor to train her and help improve her performance. When management finally decided to terminate her, it apparently did so precipitously and without getting grievant's version of the particular (Rispedal) incident or at least without paying credence thereto. Instead of issuing a Group III Notice which would sustain termination, management issued a Group II which would not. Instead of listing all the offenses noted in the back up documents, management based the Group II Notice on only the Rispedal incident. Most of the evidence presented related to the two

prior Group I Notices which were not in issue and to numerous other offenses which likewise were not in issue and for which no Written Notice had ever been issued.

Although the agency appears to have been justified in terminating grievant, it went about it in an improper manner, in violation of the Standards of Conduct and Policy and with inaccurate or at least unproven charges instead of various other charges it could have made and likely proven.

Grievant gave a credible explanation of how she prepared Risperdal labeled for the prescribed .5 mg dose. It likely would have been better for her to have cut the 1 mg. tablet in half and put only a half tablet into the cup instead of putting a whole 1 mg. tablet and an ambiguous note reading "½" into the cup. And it likely would have been better for her to dump the already prepared cup of meds she found in the drawer into the sink rather than shoving it to the back of the drawer. However the evidence does not sustain the charge that grievant prepared Risperdal 2 mg. nor that she had the primary nurse check the MAR for correct dosage.

The primary nurse displayed an understandable mindset against grievant because she knew grievant had had prior problems in the unit and that the psychiatrist didn't want her there, and on the word of the Nurse Executive director, believed grievant was not supposed to be preparing or dispensing meds. She did not know that grievant had been reassigned to the unit to prepare and dispense meds. Instead of dumping the other cup of meds in the sink or asking grievant about it she reported an apparent overdose to the psychiatrist and RN Manager I.

The Termination sanction of the initial Group II Written Notice of 12/28/05 is invalid as noted in the above Stipulation and discussion pointing out that one Group II Notice and two Group I Notices do not support termination.

The hearing officer is empowered to assess a lesser sanction such as suspension without pay if the Risperdal charge were sustained. However the evidence does not support that charge. The hearing officer concludes that the agency has not sustained its burden of proof by showing by a preponderance of the evidence that the disciplinary action or any lesser sanction is warranted and appropriate under the circumstances.

We turn now to the question of the validity of the second, revised and back dated Written Notice referred to in Issues 3, 4, and 5. It is this hearing officer's opinion that that Written Notice is of no legal force and effect, is null and void and lacking in Due Process for the following reasons. Grievant was terminated as of 12/28/05 and therefore was not under the agency's control or jurisdiction and not subject to such Written Notice. An employee contract takes two willing entities: the employer and the employee. The agency cannot of its own volition unilaterally employ grievant or any other non-employee without that person's consent and agreement. There was an untimely nearly quarter year delay between the 11/22/05 offenses which the notice seeks to address and writing of the notice on 04/17/06. This violates the above cited provisions of the Va. Code § 2.2-3003F. specifying reasonable time limitations equally applicable to agency and employee

(grievant wasn't granted equal time to respond to any Written Notice). It also violates the Standards of Conduct § VI requirement that agency corrective action be as soon as the supervisor becomes aware of any unsatisfactory performance; and § VII requirement that a Written Notice be issued as soon as possible after the offense. Falsely back dating the Written Notice to 12/28/05 does not avoid these injunctions and is in itself reprehensible. It was manifestly impossible for grievant to report to work on 01/11/02 when she did not even receive the notice until 04/19/02. Not being an employee, grievant could not grieve the notice. The grievance procedure is intended to provide due process. However every aspect of the revised back dated notice is a denial of due process.⁷

Therefore the revised back dated Written Notice has no bearing on the initial 12/28/06 Written Notice nor on the ensuing grievance nor on this hearing and decision.

DECISION

The disciplinary action of the agency is DENIED. The Group II Written Notice issued to the grievant on December 28, 2005 is DISMISSED. The first four items of RELIEF requested by grievant shall be GRANTED with back pay from December 29, 2005 to April 17, 2006,⁸ offset by any interim earnings grievant may have received. The motion of grievant's counsel is GRANTED.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with State or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed

⁷ While the Group III Written Notice with termination which grievant received on 04/25-06 is not a part of this proceeding, the same rationale would seem to apply to it.

⁸ The date of the Group III Written Notice. See Note 5. The hearing officer would have granted back pay until such date as grievant actually returns to work, but for this lesser date requested by her counsel.

to (804) 372-7401.

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of EDR. This request **must state the specific requirement of the grievance procedure with** which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, VA 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Harmon D. Maxson
Administrative Hearing Officer

June 6, 2006

Employee Relations Counselor
VA Department of MH, MR & SAS
P.O. Box 1797
Richmond, VA 23218-1797

RE: Grievance Case No. 8311

Dear Employee Relations Counselor:

Your June 2, 2006 request for reconsideration of my May 18, 2006 Decision is granted even though it was not received until June 3, 2006 and hence is out of time.

I have reconsidered the decision and do not find that it requires any change other than the attached Addendum I correcting the two dates you refer to from 02 to 06, and adding notice to grievant's counsel concerning submission of any petition for attorney's fees.

You urge that the Decision is inconsistent with State Policy and contains an incorrect legal conclusion.

You have not cited any State Policy, written or unwritten, that once an employee has timely grieved (12/24/05)¹⁴ an improper Group II Written Notice & Removal (12/28/05) that violated the Standards of Conduct; and a hearing officer has been appointed (03/16/06) to hear the grievance and to consider the relief requested including reinstatement, back pay and benefits; and a pre hearing conference held (03/22/06) and a hearing date established, that the agency may then on 04/17/06, nearly a quarter of a year after the initial Group II, issue a second Group II Written Notice backdated to 12/28/05 without notice to the hearing officer, and apparently without notice to DEDR so that the cases could be consolidated.

You allege that the second Group II Written Notice was merely to correct the first and to reduce the sanction from Removal to 10 days suspension. If allowed to stand, it in effect would subvert the entire grievance procedure. For that reason I treated it as an ancillary matter in my Decision. You argue that the second Group II involved reinstatement and back pay, so the relief of reinstatement was not available for the hearing officer to grant. This is an example of attempted subversion in practice. The second Group II was actually a prop to set grievant up for 10 days suspension without pay followed by a Group III Termination (see pp. 3 & 8 of my Decision, and Hearing Officer Ex. 4.). As stated on page ten of my Decision, I found that the agency failed to show by the preponderance of the evidence that the facts justified even the 10 day suspension of its second, backdated Group II Written Notice. At the time of the 05/10/06 hearing the agency had not granted any of the benefits requested by the grievant and granted by my subsequent decision.

¹⁴ No explanation was offered as to how the grievance Form A predates the Written Notice.

You argue that even though grievant was Removed on 12/28/05 she was still an employee on 04/17/06 giving the agency jurisdiction to issue the second Group II Written Notice. In the real world and even in Donald Trump's world, Fired means Fired. Under the circumstances and under the Grievance Procedure, only the hearing officer had authority to order her reinstatement.

I affirm all the reasons stated at pp. 10-11 of my Decision why the second Group II Written Notice is null and void, lacking in Due process, and of no legal force and effect, and hereby affirm my entire Decision.

Harmon D. Maxson
Administrative Hearing Officer

COMMONWEALTH OF VIRGINIA
Department of Mental Health, Mental Retardation & Substance Abuse

ADDENDUM I TO
DECISION OF HEARING OFFICER

In the Matter of: Grievance Case No. 8311

Hearing Date: May 10, 2006
Decision Issued: May 18, 2006
Addendum Issued: June 5, 2006

ERRATA

The dates of 01/11/02 and 04/19/02 on lines six and seven of page 11 of the decision should be changed to 01/11/06 and 04/19/06.

Grievant's counsel is advised that any petition for attorney's fees should be received by the hearing officer within 15 calendar days of the issuance of the original decision.

Harmon D. Maxson
Administrative Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
Department of Mental Health Mental Retardation
and Substance Abuse Services

November 7, 2006

The agency has requested an administrative review of the hearing officer's decision in Case No. 8311. The agency objected to the hearing officer's decision on the basis that the hearing decision is inconsistent with State policy and is based on an incorrect legal conclusion. This agency will address only the issue of inconsistency with State policy. The agency head of the Department of Human Resource Management (DHRM) has requested that I respond to this administrative review request.

FACTS

The Department of Mental Health Mental Retardation and Substance Abuse Services (Commonwealth Center for Children and Adolescents) employed the grievant as a registered nurse at the facility for approximately two to three years. Her principal job was to dispense medication to clients that often included individuals who did not know if they were receiving the proper dosage.

The grievant was issued a Group I Written Notice on November 15, 2005, for unsatisfactory work performance, and non-compliance with policies and procedures. It was noted that she had been counseled on October 24, 2005, and on November 4, 2005. She was also issued a second Group I Written Notice on November 15, 2005, for reporting to work late, for substandard performance, needed improvement, and unsatisfactory attendance.

The grievant, on December 21, 2005, was issued an Interim Evaluation Form for placing an inaccurate order for Epsom Salt B.I.D. On December 22, 2005, the RN Manager I sent a memo to the Nurse Executive Director relating that on December 22, 2005, a psychiatrist stated that due to the grievant's continuing multitude of medication errors the grievant should not work in the children's unit. This was based on a seclusion incident that occurred on December 22, 2005, and the two incidents of alleged incorrect dosages of medication for dispensing.

On December 27, 2005, the grievant was issued a Notice of Improvement Needed/Substandard Performance related to the above two incidents of incorrect dosage of medicine and failure to file a timely report related to the seclusion

incident on December 22, 2005. The Nurse Executive Director issued to the grievant a Group II Written Notice with removal, effective December 28, 2005.

The grievant filed a grievance and the hearing officer held a pre-hearing conference on March 22, 2006. During the hearing, the hearing officer pointed that the grievant had been terminated improperly because she had on record only two active Group I Written Notices and one active Group II Written Notices, not sufficient to support termination. To correct the situation, on April 17, 2006, the agency issued to the grievant a second Group II Written Notice, backdated with a December 28, 2005, effective date. This disciplinary action did not terminate her but suspended her for ten days. This revised, second Group II Written Notice included issues that were omitted from the original notice.

In his decision, the hearing officer determined that the second Group II Written Notice issued on April 17, 2006, and backdated to December 28, 2005, was illegal. More specifically, he stated that the grievant was no longer an employee (she had been terminated effective December 28, 2005, by an earlier disciplinary notice-an action that was improper due to insufficient accumulation of notices) and therefore she would not have had an opportunity to challenge her termination. Furthermore, he noted that the second Group II Written Notice was not issued in a timely manner, some three and one-half months after the most recent performance incident had occurred. In addition, the hearing officer heard only the first of the Group II Written Notices. Finally, she was issued a Group III Written Notice, with termination, on April 24, 2006. The outcome of that grievance process is not included in this administrative review because there has been no request for any such review by this Agency.

The relevant policy, the Department of Human Resource Management's Policy No.1.60, states that it is the Commonwealth's objective to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth, but is not all-inclusive, examples of unacceptable behavior for which specific disciplinary action may be warranted.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, the Department of Human

Resource Management has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by the Department of Human Resource Management or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In his decision, the hearing officer stated, "Although the agency appears to have been justified in terminating grievant, it went about it in an improper manner, in violation of the Standards of Conduct and Policy and with inaccurate or at least unproven charges instead of various other charges it could have made and likely proven." Based on his determination, he directed that the agency remove the Group II Written Notice and reinstate the grievant with lost back pay and benefits.* In addition, the hearing officer also determined that the agency had not, based on the preponderance of the evidence, proven that the grievant's actions warranted a Group II level disciplinary action. The question therefore is whether the agency improperly re-issued a second Group II Written Notice with a ten-day suspension after the hearing officer had pointed out at the pre-hearing that the termination of the employee could not be supported based on accumulation of written notices.

The DHRM concurs with the hearing officer regarding whether the agency followed proper procedures when it attempted to terminate the grievant without the sufficient number of written notices. The DHRM also concurs that it was improper to issue the second Group II Written Notice, given the passage of time. Concerning whether or not the agency proved its case in order to sustain the first Group II Written Notice is an evidentiary matter and is beyond the purview of DHRM to rule on that issue.

Therefore, this Department has no basis to interfere with the application of the hearing officer's decision.

Ernest G. Spratley
Manager, Employment
Equity Services

* Agency officials have indicated that the grievant was compensated for her lost wages and restored her benefits as per the hearing officer's decision. The grievant was offered an opportunity to return to work but she never responded to the agency's offer.