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COMPLIANCE RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2021-5208
February 19, 2021

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether her February 8, 2021 grievance with the Department of Behavioral Health and Developmental Services (the “agency”) complies with the grievance procedure.

FACTS

On or about November 19, 2020, the grievant received a Group I Written Notice that charged her with failure to follow instructions and/or policy. She filed a grievance challenging the disciplinary action on December 10. On February 4, 2021, following the second step meeting, the agency provided the grievant with an amended Written Notice. In addition to making clerical corrections, the revisions added a new offense code to the Written Notice: unsatisfactory performance. The “Offense” and “Circumstances considered” sections of the amended Written Notice describing the grievant’s alleged misconduct are identical to the original Written Notice, with the exception of a reference to the offense being considered unsatisfactory performance as well as failure to follow instructions and/or policy.

The grievant filed a second grievance on February 8, 2021 alleging “[r]etaliatio[n] for participating in the grievance process,” “[m]isapplication of state personnel policies, procedures, rules, and regulations,” and “[d]iscrimination based on sex.” In support of these claims, the grievant described her receipt of the amended Written Notice and argued that the revisions to that document were retaliatory. More specifically, the grievant asserted that the agency amended the Written Notice because of information she presented at the second step meeting, including evidence that undermined the charge on the original Written Notice and a claim that she was “treated differently as a woman from [her] male counterparts.” As relief, the grievant requested “[r]escission of all Group Written Notices . . . and deliberate actions to pad the disciplinary action after the fact.”

Upon receiving the February 8, 2021 grievance, the agency notified the grievant that it was being administratively closed because it did not comply with the initiation requirements of the

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grievance procedure.¹ In particular, the agency determined that the February 8 grievance was duplicative of the December 10, 2020 grievance and challenged matters of alleged noncompliance related to the agency's handling of the December 10 grievance. The grievant now appeals that determination to EDR, arguing that the February 8 grievance should be re-opened.

DISCUSSION

Section 2.4 of the *Grievance Procedure Manual* states that a grievance may not “challeng[e] the same management action or omission challenged by another grievance.” Having reviewed the December 10, 2020 and February 8, 2021 grievances, EDR finds that they do not challenge separate and distinct management actions. Rather, it appears that the central issue in both grievances is the same: the grievant's receipt of a Group I Written Notice. Indeed, the grievant seeks removal of the Written Notice as relief in both grievances. Moreover, the agency did not rescind and reissue the Written Notice; it revised the existing document. While this ruling was pending, the agency qualified the December 10, 2020 grievance for a hearing, where the merits of the Written Notice will be addressed.

Although modifications to a Written Notice or other personnel document may, in some circumstances, constitute a new management action that could be separately grieved, the revision of the Written Notice here is not a distinct management action. In her February 8, 2021 grievance, the grievant alleges that the addition to the Written Notice of a new offense code for unsatisfactory performance is evidence of discrimination and retaliation, as well as a misapplication of policy that has prevented her from fully contesting the Written Notice through the management steps. Beyond the specific concerns identified in the February 8 grievance, amending a Written Notice to add a new offense code could also potentially raise a due process question of whether the grievant received adequate notice of the charge and an opportunity to respond. Nevertheless, EDR has reviewed nothing to suggest that the February 8 grievance is intended to challenge any management action other than the Written Notice, apart from the agency's revision of the Written Notice following the second step meeting. The February 8 grievance instead appears to incorporate additional theories and arguments as to why the grievant believes the disciplinary action itself, along with the agency's subsequent revisions, were improper.

A grievance cannot be amended to include “challenges to additional management actions or omissions” after it has been initiated,² but a grievant may argue alternative theories as to why the challenged management actions or omissions were improper. The grievant may therefore present any claims articulated in the February 8, 2021 grievance – including her assertions regarding retaliation, discrimination, and misapplication of policy – at the hearing on the December 10, 2020 grievance if she so desires. This would include claims regarding both the Written Notice as originally issued and the amendments to the Written Notice during the management steps. However, we conclude that the February 8 grievance does not challenge a new management action or omission, and thus it is duplicative of the December 10 grievance. Accordingly, the February 8 grievance will remain administratively closed.

¹ See *Grievance Procedure Manual* § 2.4.

² *Id.*

CONCLUSION

For the reasons set forth above, the grievant's February 8, 2021 grievance will remain closed. The parties are advised that the grievance should be marked as concluded due to initiation noncompliance and no further action is required. However, EDR will include a copy of the February 8, 2021 grievance with the appointment file for the December 10, 2020 grievance to ensure that any arguments raised in both grievances as to the challenged Written Notice and its revisions will be before the hearing officer for consideration. EDR's rulings on matters of compliance are final and nonappealable.³

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³ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).