Issue: Compliance/removal of written notice; Administrative Review/hearing decision; Ruling Date: June 26, 2006; Ruling #'s2006-1370, 2006-1379; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: hearing officer in compliance

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution
COMPLIANCE and ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation,
and Substance Abuse Services
Ruling Numbers 2006-1370, 2006-1379
June 26, 2006

The grievant seeks a compliance ruling regarding a May 4, 2006 grievance challenging an April 17, 2006 Group III Written Notice. The grievant appears to assert that based on statements contained in a footnote in an earlier unrelated grievance hearing decision, the Group III Notice should be removed.

FACTS

The grievant was employed by the Department of Mental Health, Mental Retardation and Substance Abuse Services (or agency) as a registered nurse (RN) for approximately one to two years. She was assigned to facility Unit Two to dispense medications to patients.

On November 15, 2005 the 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 October 24, 2005 and November 4, 2005. On the same day, the 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.

On December 21, 2005, the grievant was issued an Interim Evaluation Form reporting that an order for Epsom Salt B.I.D. was inaccurately placed. A day earlier, a memo was sent, apparently from another nurse to the Nurse Executive Director concerning a lack of communication or mix up between the nurse and the grievant, and failure by the grievant to write another exclusion order or "pink sheet."

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. His new issues of concern included a seclusion incident in his unit on the morning of December 22, 2005, of which he was not informed. No exclusion order was written at the time. The 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 December 22, 2005 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.

On December 27, 2005, the Nurse Executive Director issued the grievant a Notice of Improvement Needed/Substandard Performance which related to the Zoloft and Risperdal errors and failure to timely report the seclusion on December 22, 2005. 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 recommended that the grievant be terminated for continued substandard performance.

On December 28, 2005, the Nurse Executive Director issued grievant a Group II Written Notice with "Removal" effective December 28, 2005. The notice charged 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.

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 December 24, 2005. 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 Personnel Policies and Procedures.

On March 22, 2006, during the pre-hearing conference, the parties stipulated and the hearing officer found that removal under the initial December 28, 2005 Group II Written Notice was not supported by policy or precedent and was a misapplication of the Standards of Conduct and Policy, since it was supported by only the Group II itself and two active Group I Written Notices.

To address the problem, on April 17, 2006, 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.

On the same day, the agency issued the Grievant a Group III Written Notice with termination for "violating safety rules where there is a threat of physical harm relating to the December 27, 2005 incident where the grievant allegedly "altered the practice and the procedure for obtaining blood from a patient AND [she] mislabeled the lab specimen with another patient's name **AND** [she] did not fill out required lab forms correctly." On May 4, 2006, the grievant initiated a grievance challenging the April 17, 2006 Group III Notice. **(**This is the Group Notice that grievant now urges this Department to remove.)

On May 10, 2006, a hearing was convened to address the December 28, 2005 and April 17, 2006 Group II Written Notices. 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. The grievant's counsel concurred. 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.

In his May 18, 2006 hearing decision the hearing officer held that:

> 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 (Risperdal) 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 Risperdal incident. Most of the evidence presented related to the two prior Group I Notices which were not in [sic] issue and to numerous other offenses which likewise were not in issue and for which no Written Notice had ever been issued.
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> 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.

Observing that the termination sanction of the initial Group II Written Notice of December 28, 2005 was invalid as noted in the stipulation as one Group II Notice and two Group I Notices do not support termination, he noted that he could nevertheless assess a lesser sanction, such as suspension without pay, *if* the Risperdal charge was sustained. However, he concluded that the evidence did not support that charge. The hearing officer found that the grievant gave a credible explanation of how she prepared Risperdal labeled for the prescribed .5 mg dose.

The hearing officer then addressed the validity of the second, revised and back dated Written Notice of April 17, 2006. He concluded that the second 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 December 28, 2005 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. [sic] 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 [sic] when she did not even receive the notice until 04/19/02[sic]. 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.

The hearing officer stated in dictum in a footnote to the above quoted portion of the hearing text that: "While the Group III Written Notice with termination which grievant received on 04/25-06 is not a part of this proceeding, the same rational would seem to apply to it."[1] It is this dictum upon which the grievant relies in urging this Department to rule in her favor on her pending Group III Notice.

[1] Note 7 of the hearing decision.

The hearing officer concluded his May 18th decision by holding that the disciplinary action of the agency is denied and the Group II Written Notice issued to the grievant on December 28, 2005 is dismissed.

On June 2, 2006, the agency requested the hearing officer to reconsider his decision. The agency pointed out two date errors and asserted that the agency "provided due process to the Grievant prior to the issuance of the original Group Notice," and that the agency "modified the group notice to reduce the discipline; the basis of the issuance of the group notice was unchanged." The agency argues that "clearly the Grievant was 'employed' or she would not have been afforded the opportunity to grieve."

On June 6, 2006, the hearing officer issued his reconsidered opinion, which concluded that the agency had presented no reason to alter his original decision other than to change two typographical date errors (2002 to 2005) and to add notice to grievant's counsel concerning submission of a petition for attorney's fees. The reconsidered opinion characterized the second Group II as a "prop to set grievant up for 10 days suspension without pay followed by a Group III Termination."

On June 12, 2006, the agency requested this Department to review the hearing officer's decision, objecting to the hearing officer's order of reinstatement. The agency also objected to the hearing officer's characterization of the second Group II as a "set up" as well as the hearing decision's comment about the Group III Notice, which the agency notes "was not a part of the grievance."

DISCUSSION

Compliance—Removal of the Group III Notice

As noted above, relying on the hearing officer's statement in note 7 of the hearing decision, the grievant contends that the April 17th Group III Notice should be dismissed.

Under the grievance procedure a hearing officer may only rule on issues qualified for hearing.[2] In this case, the Group III Written Notice was not an issue qualified by the agency head, the EDR Director, or the Circuit Court and thus it was not before the hearing officer. Accordingly, the dictum in note 7 has no force or effect with respect to the April 17th Group III Written Notice.[3]

This Department's rulings on matters of procedural compliance are final and nonappealable.[4]

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[2] *See Rules for Conducting Grievance Hearings* § I ("Any issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing.")

[3] For example, because the Group III Written Notice was not before the hearing officer, the dictum cannot even be considered a recommendation that can be implemented by a circuit court.

[4] Va. Code § 2.2-1001(5).

Administrative Review

Under the grievance procedure, only issues qualified by the agency head, the EDR Director, or the Circuit Court may be decided by the hearing officer.[5] In this case, neither the Group II Written Notice of April 17, 2006, nor the Group III Written Notice of April 17, 2006 had been qualified for hearing. The only qualified issue before the hearing officer was the December 28, 2005 Group II Written Notice with removal, and the hearing officer found that the agency's evidence did not support the charge. Accordingly, this Department cannot conclude that the hearing officer acted outside the scope of his authority when he ordered the reinstatement of the grievant. Finally, the hearing officer's comments about the April 17, 2006 Group II and Group III Written Notices are harmless error at most, and have no bearing on the question of whether the hearing officer acted within the scope of his authority with respect to the issue before him, the December 28, 2005 Group II Written Notice with removal.

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[6] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[7] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[8] As noted above, this Department's rulings on matters of procedural compliance are final and nonappealable.[9]

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Claudia T. Farr
Director

[5] *Rules for Conducting Grievance Hearings*, § I ("Any issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing.")
[6] *Grievance Procedure Manual*, § 7.2(d).
[7] Va. Code § 2.2-3006(B); *Grievance Procedure Manual*, § 7.3(a).
[8] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).
[9] Va. Code § 2.2-1001(5).