

Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date:  
February 9, 2011; Ruling No. 2011-2902; Agency: Department of Labor and  
Industry; Outcome: Agency In Compliance.



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of the Department of Labor and Industry  
Ruling No. 2011-2902  
February 9, 2011

The Department of Labor and Industry (the agency) has requested a compliance ruling in Case No. 9508. In particular, the agency challenges the hearing officer's statement during a pre-hearing conference that a potential problem exists with the agency's issuance of two Group III Written Notices, both with termination. For the reasons discussed below, this Department concludes that the agency may present evidence at hearing on both Written Notices.

FACTS

On September 23, 2010, the grievant was issued two Group III Written Notices and both listed the effective date of termination as September 23, 2010. The Written Notices were for two separate offenses that do not appear to stem from the same incident of misconduct. More specifically, one of the Group III Written Notices was issued because the grievant filed "unsubstantiated" criminal charges against her supervisor resulting in a loss of over 400 hours of state time. The other Group III Written Notice charges the grievant with performing numerous personal acts while on state time resulting in a loss of productivity as well as charges her with using agency equipment for personal use.

The grievant challenged the two Written Notices through the grievance process and a hearing officer was appointed. During a pre-hearing conference regarding this matter, the hearing officer suggested that there was a potential problem with giving the grievant two Written Notices that both terminate her employment. More specifically, according to the hearing officer, one of these two Group III Written Notices had to have come first in time, even if only moments prior to the second, thereby rendering the second Group III Written Notice null and void as the grievant was no longer employed by the Commonwealth at the time of its issuance.<sup>1</sup> The hearing officer's opinion in this

---

<sup>1</sup> It appears as though the hearing officer is contending that, in cases involving termination, the agency must allege multiple violations on a single Written Notice, rather than on multiple Written Notices.

regard is apparently based upon EDR Ruling #2009-2141.<sup>2</sup> Before proceeding to hearing, the agency has asked this Department to address this procedural matter.

### DISCUSSION

EDR Ruling #2009-2141 appears to be factually distinguishable from the instant case. In particular, in Ruling #2009-2141, the Group III Written Notice with termination was issued quite some time after the initial removal from employment and there was no question as to the grievant's employed status at the time of issuance of that Group III Written Notice with termination. In contrast, in the instant case, it appears that the two Group III Written Notices with termination were likely issued *simultaneously or nearly simultaneously* and as part of one termination transaction. If the hearing officer so finds, Ruling No. 2009-2141 would have no application in this case. If multiple Written Notices are presented in a single meeting or transaction, it would appear that the employee could reasonably be viewed as having been discharged through the transaction, not merely as a result of the first Written Notice that happened to be drafted or received. That issue, however, is ultimately one of policy interpretation.<sup>3</sup> As such, either party may raise this issue with the hearing officer at the grievance hearing and with the DHRM Director during the administrative review phase of this proceeding.

However, in the interest of judicial efficiency and to avoid the potential for two hearings in this case (should the DHRM Director ultimately rule that the simultaneous or nearly simultaneous issuance of two Written Notices with termination is permitted under policy) this Department concludes that both Group III Written Notices with termination may proceed to hearing, and orders the hearing officer to take evidence on both of these Written Notices in accordance with the *Grievance Procedure Manual* and the *Rules for*

---

<sup>2</sup> In EDR Ruling #2009-2141, the grievant challenged his removal from employment through the grievance process. The grievance proceeded to hearing and the hearing officer reinstated the grievant to his employment. After the hearing officer's order for reinstatement, but prior to the grievant being reinstated due to the pending appeal of the matter, the agency issued the grievant a Group III Written Notice with termination, which the grievant challenged through use of the grievance process. This Department concluded that the grievant did not have access to challenge the written notice and stated:

Because the Group III Written Notice was issued after the grievant's termination by the agency, and before any reinstatement, it did not result in his termination or involuntary separation. Moreover, we have previously been advised by the Department of Human Resource Management (DHRM), the agency charged with developing and interpreting policies affecting state employees, that DHRM Policy 1.60, "Standards of Conduct," does not apply to former employees, and therefore a Written Notice should not be issued to an individual no longer employed by the state. As a result, it would appear that the Group III was null and void upon its issuance and had no effect on the grievant's status.

EDR Ruling Number 2009-2141.

<sup>3</sup> Whether an agency can simultaneously issue two Group III Written Notices both with termination under DHRM Policy 1.60, *Standards of Conduct*, is not a decision this Department can ultimately make. Rather, the Director of the DHRM (or her designee) has the authority to interpret all policies affecting state employees, and to assure that hearing decisions are consistent with state and agency policy. Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

*Conducting Grievance Hearings.* This Department expresses no opinion as to the hearing officer's duties with regard to his decision in this case, but rather only determines that he must allow the agency to present evidence on both Written Notices.

This Department's rulings on matters of compliance are final and nonappealable.<sup>4</sup>

---

Claudia T. Farr  
Director

---

<sup>4</sup> See Va. Code § 2.2-1001(5); 2.2-3003(G).