

Issues: Group III Written Notice (violation of drug/alcohol policy) and Termination;  
Hearing Date: 04/25/11; Decision Issued: 04/25/11; Agency: DBHDS; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 9559; Outcome: Partial Relief.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9559**

Hearing Date: April 25, 2011

Decision Issued: April 25, 2011

**PROCEDURAL HISTORY**

On January 7, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for violation of Departmental Instruction 502 - tested positive for drugs during a patient abuse allegation investigation.

On January 24, 2011, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On March 28, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 25, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Behavioral Health and Developmental Services employed Grievant as a Certified Nursing Assistant at one of its Facilities.

Grievant had prior active disciplinary action. On December 27, 2010, Grievant received a Group III Written Notice of disciplinary action for physical abuse of a client. Grievant was removed from employment affected December 27, 2010.

### **CONCLUSIONS OF POLICY**

Grievant was removed from employment on December 27, 2010 pursuant to a Group III Written Notice of disciplinary action for physical abuse of a client. She did not file a grievance challenging that Written Notice. The Group III Written Notice issued on December 27, 2010 was not assigned to this Hearing Officer for adjudication. On January 24, 2011, Grievant filed a grievance describing the issue as "Group III Termination For Positive Urine Screen."

Once an employee has been removed from employment, that employee is no longer subject to disciplinary action. The Agency does not have authority to take disciplinary action against a former employee. Accordingly, the Group III Written Notice of disciplinary action issued on January 7, 2011 must be reversed. The Hearing Officer will not reinstate Grievant to her former position because reversal of the January 7,

2011 Group III Written Notice does not have the effect of reversing the December 27, 2010 Group III Written Notice.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. Grievant's request to be reinstated is **denied**.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director  
Department of Employment Dispute Resolution  
600 East Main St. STE 301  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>1</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>1</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.