

Issue: Group III Written Notice with termination (engaging in activity that undermined the agency's effectiveness); Hearing Date: 03/27/12; Decision Issued: 03/28/12; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9781; Outcome: Full Relief; **Administrative Review: EDR Ruling Request received 04/11/12; EDR Ruling No. 2012-3320 issued 06/08/12; Outcome: AHO's decision affirmed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9781**

Hearing Date: March 27, 2012  
Decision Issued: March 28, 2012

**PROCEDURAL HISTORY**

On November 18, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for behavior that resulted in a significant violation of public trust.

On December 14, 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 he requested a hearing. On February 29, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 27, 2012, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
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:

Virginia Commonwealth University employed Grievant as a Police Sergeant. He began working for the Agency in 2004 after receiving a letter from a prior Chief of Police offering him employment with the Agency. No evidence of prior active disciplinary action was introduced during the hearing.

On November 15, 2011, Grievant was arrested by the local Police and members of the Federal Bureau of Investigations for two counts of violating Virginia Code Section 18.2-374.1, both felony charges.

At 7 a.m. on November 15, 2011, the Chief of Police met with Grievant. The Chief of Police removed Grievant's police powers and advised him that he was the subject of a felony investigation. The Chief of Police took Grievant's weapon and relinquished him to investigators.

On November 15, 2011, the Chief of Police spoke with the Human Resource Officer about whether the Agency's concerns regarding Grievant could be resolved by Grievant resigning. The Human Resource Officer and the Chief of Police concluded that Grievant's resignation would be the quickest way to end his affiliation with the Agency.

The Chief of Police received a call indicating that Grievant wished to speak with the Chief of Police. The Chief of Police went to Grievant's location where he was in the custody of local Police. The Chief of Police indicated that Grievant's resignation would be appropriate. Grievant told the Chief of Police that he was resigning from his position with the Agency. Grievant presented a document dated November 15, 2011 stating:

I hereby request based on the charges presented against me to formally put forth my resignation effective immediately. I do this with the thought to prevent as much undue stress on my honorable department and to the respect of my co-workers.<sup>1</sup>

Grievant signed the statement. Grievant's statement was made voluntarily. Grievant believed his resignation ended his employment relationship with the Agency at that time. The Chief of Police received Grievant's written resignation and signed his name and the date below Grievant's signature. When the Chief of Police received Grievant's written resignation, the Chief of Police considered Grievant to have resigned from his position and no longer employed by the Agency.

Later in the day on November 15, 2011, the Chief of Police spoke with the Human Resource Officer who indicated that Agency managers had decided not to accept Grievant's resignation and intended to go forward with disciplinary action against Grievant. The Agency took disciplinary action against Grievant and removed him from employment. Grievant initiated a grievance seeking "acceptance of resignation in lieu of termination."

### **CONCLUSIONS OF POLICY**

Although the criminal charges against Grievant had not yet been resolved, the Agency has presented sufficient evidence to show that Grievant engaged in behavior justifying the issuance of a Group III offense with removal. Because of the nature of the evidence against Grievant and this matter must be resolved by factors other than that evidence, it is not necessary for the Hearing Officer to discuss the details of Grievant's behavior.

An agency may not take disciplinary action against an individual who is no longer employed by the agency. Once an employee resigns from an agency, disciplinary action issued to that employee after the resignation is void.

Resignation is an employee's voluntary separation from state service. An employee resigns from an agency when he or she voluntarily expresses an intent to end the employment relationship. A resignation becomes effective at the time specified by the employee. Although employees are asked to give reasonable notice of resignation, they are not required to do so.

---

<sup>1</sup> Agency Exhibit 2.

On November 15, 2011, Grievant told the Chief of Police that he was resigning from the Agency immediately. He gave the Chief of Police a handwritten note stating that he was resigning from the Agency immediately. The Chief of Police received the note and signed it to acknowledge receipt of Grievant's resignation. Grievant's resignation from the Agency was effective on November 15, 2011 at the time he informed the Chief of Police that he had resigned.

The Agency argued that it had the right to refuse to accept that Grievant's resignation. Nothing in State policy permits an agency to refuse an employee's resignation. Nothing in State policy permits an agency to refuse to accept an employee's resignation until it has sufficient time to issue disciplinary action.

If the Hearing Officer assumes for the sake of argument that a resignation does not become effective until accepted by an agency, the Agency accepted Grievant's resignation on November 15, 2011. The Hearing Officer believes that the Chief of Police had the authority to "accept" Grievant's resignation because a prior Chief of Police had the authority to issue a letter to Grievant offering him employment with the Agency. With the Chief of Police signed his name on Grievant's letter of resignation, the Chief of Police considered Grievant to be no longer an employee of the Agency. Grievant's resignation was "accepted" and in effect at that time.

The Agency issued disciplinary action to Grievant on November 18, 2011 after Grievant had resigned from the Agency on November 15, 2011. The Agency lacked the authority to issue a former employee disciplinary action. Accordingly, the Group III Written Notice of disciplinary action with removal must be reversed.<sup>2</sup> Removing the Group III Written Notice does not result in Grievant's reinstatement or the award of attorney's fees.

## DECISION

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

## 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:

---

<sup>2</sup> The Hearing Officer will not prohibit the Agency from amending its records to show the Grievant resigned in lieu of termination.

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>3</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>3</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.