

Issue: Administrative Review of Hearing Officer's decision in Case No. 9781; Ruling  
Date: June 8, 2012; Ruling No. 2012-3320; Agency: Virginia Commonwealth  
University; Outcome: Hearing Decision in Compliance.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Virginia Commonwealth University  
Ruling Number 2012-3320  
June 8, 2012

Virginia Commonwealth University (“VCU” or “the agency”) has requested that this Department (EDR) administratively review the hearing officer’s decision in Case Number 9781. For the reasons set forth below, this Department finds no reason to disturb the hearing officer’s determination in this matter.

**FACTS**

The relevant facts of this case as set forth in Case Number 9781 are as follows:

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 [sic] 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.

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."<sup>1</sup>

Based on the foregoing facts, the hearing officer reached the following 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.

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.

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<sup>1</sup> Decision of Hearing Officer, Case No. 9781, March 28, 2012 ("Hearing Decision"), at 2-3 (footnote omitted).

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 [sic] 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. Removing the Group III Written Notice does not result in Grievant's reinstatement or the award of attorney's fees.<sup>2</sup>

### DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions ... on all matters related to procedural compliance with the grievance procedure."<sup>3</sup> If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.<sup>4</sup>

The agency concedes that one of its managers, the Chief, accepted and signed the letter of resignation from the grievant. The agency asserts that once VCU management became aware of the grievant's arrest, it rescinded its acceptance of his resignation. The agency asserts that "the Hearing Officer lacks the authority to compel the Agency to accept Grievant's resignation."

We find no error with the hearing decision as a matter of compliance with the grievance procedure. This Department has previously addressed the issue of whether an agency can issue an employee a disciplinary action after employment has been severed. In EDR Ruling Number 2009-2141, an employee was issued a Written Notice during a timeframe when he was no longer employed by the agency. EDR Ruling Number 2009-2141 observed that:

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<sup>2</sup> Hearing Decision at 3-4 (footnote omitted).

<sup>3</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>4</sup> See *Grievance Procedure Manual* § 6.4(3).

[W]e 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. Accordingly, this Department concludes that the grievant did not have access to the grievance procedure when he initiated his September 4, 2008 grievance.<sup>5</sup>

The same principle would appear to apply in this case. Here, it is undisputed that the grievant submitted a resignation and the agency accepted it. The agency asserts that after it accepted the resignation, it attempted to rescind that acceptance. The only basis advanced by the agency in support of its argument that it can discipline someone who has resigned is a reference to the *Rules for Conducting Grievance Hearings* (“*Rules*”). The agency cites to the *Rules* provision that requires the hearing officer to consider management’s right to exercise its good faith business judgment in employee matters that are consistent with law and policy.<sup>6</sup> While the agency has essentially correctly stated the *Rules* position, the agency has not cited to any authority for the proposition that it can essentially force back into employment an employee who has submitted a resignation which has been accepted. In the absence of any support for such a position, either in law or policy, this Department cannot conclude that the hearing officer erred in his ruling that once the resignation was accepted, the agency no longer had the ability to discipline him. Thus, this Department finds no error with the hearing decision.

#### CONCLUSION AND APPEAL RIGHTS

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.<sup>7</sup> 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.<sup>8</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>9</sup>

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Claudia T. Farr  
Director

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<sup>5</sup> EDR Ruling No. 2009-2141 (footnotes omitted).

<sup>6</sup> See *Rules* § VI(B) (“In reviewing agency-imposed discipline, the hearing officer must give due consideration to management’s right to exercise its good faith business judgment in employee matters, and the agency’s right to manage its operations. Therefore, if the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency’s discipline was consistent with law and policy, the agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.”).

<sup>7</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>8</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>9</sup> *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).