

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 07/09/19;  
Decision Issued: 07/30/19; Agency: W&M; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 11216; Outcome: No Relief – Agency Upheld.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11216**

Hearing Date: July 9, 2018  
Decision Issued: July 30, 2018

#### **PROCEDURAL HISTORY**

On February 7, 2019, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On March 6, 2018, 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 May 31, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On July 9, 2018, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 College of William and Mary employs Grievant as a Fiscal Tech Sr. She has been employed by the Agency since 1991. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency allows its employees to use a Small Purchase Credit Card (SPCC) to purchase meals related to Agency business. Once an employee purchases a meal using the SPCC, the employee is supposed to attach a receipt and complete a form justifying the expenditure.

Employees may not use the SPCC to pay for single dinner meals. For example, two employees must meet relating to Agency business and then one employee pays for both meals.

Grievant received training providing:

#### **Business Meals**

The SPCC may not be used for per diem meals during individual travel and may never be used for personal meals.<sup>1</sup>

The Agency had a summer Program on its campus for approximately 45 students. Grievant was involved in providing assistance with the Program. The Agency provided employees in the Program with meal cards allowing them to eat at two Facilities on campus. Grievant was offered the meal card, but declined to accept it.

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<sup>1</sup> Agency Exhibit 9.

Grievant used her SPCC card to pay for 11 meal charges from July 1, 2017 through July 10, 2017. The charges were made at local restaurants near the Agency's campus. She was not meeting with anyone else to discuss Agency business during the meals.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."<sup>2</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

The Agency's Business Meals Internal Operating Guidelines states:

Generally, meal expenses that do not involve an overnight stay are not reimbursable. The exception is Business Meals – which usually should be with at least one other non-College of William and Mary employee – for the purpose of discussing official State business.

The Agency's Small Purchase Charge Card Procedures provides:

### Business Meals

Non-travel related business meals may be placed on the SPCC after the restaurant restriction has been removed. Per diem meals during individual travel and personal meals are not permitted on the SPCC.<sup>3</sup>

Failure to follow policy is a Group II offense.<sup>4</sup> From July 1, 2017 through July 10, 2017, Grievant used her SPCC card to pay for personal meals at local restaurants. She violated Agency policy because "personal meals are not permitted on the SPCC." The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that on prior occasions she had been permitted to purchase personal meals on the SPCC. Although the Agency's policy may have been different in the past, the policy for which Grievant received training provides that the SPCC may not be used to purchase personal meals.

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<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> Agency Exhibit 3.

<sup>4</sup> See, Attachment A, DHRM Policy 1.60.

Grievant argued the restaurant restriction had been removed. Removal of the restaurant restriction would authorize use of the SPCC for personal meals.

Grievant argued the Agency failed to follow progressive discipline because she had not been counseled regarding her behavior prior to the issuance of a Group II Written Notice. Although agencies are encouraged to use progressive disciplinary action, they are not required to do so under the Standards of Conduct. The Agency's failure to counsel Grievant about how to use the SPCC does not form a basis to reverse or modify the disciplinary action.

The Agency used a 2003 version of the Written Notice form instead of the current version. Grievant argued that the Written Notice must say it will affect her annual performance evaluations. The Agency's use of a prior version of the Written Notice form does not affect the disciplinary action in this case.

Grievant argued that she ate at restaurants near the campus because she would park close to the restaurant doors and not have to walk uphill. Grievant asserted that she had handicapped parking and had a disability. The evidence showed that Grievant did not tell any supervisor of her difficulty eating at the two Facilities on campus. Grievant used her SPCC to purchase personal meals without authorization to do so.

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management ...."<sup>5</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**.

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<sup>5</sup> Va. Code § 2.2-3005.

## APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR 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 EEDR before filing a notice of appeal.