

Issue: Group III Written Notice with Termination (failure to follow policy); Hearing Date: 07/16/14; Decision Issued: 08/04/14; Agency: VPI&SU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10302; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10302

Hearing Date: July 16, 2014
Decision Issued: August 4, 2014

PROCEDURAL HISTORY

On February 7, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for purchasing food using her meal card while she was on her day off from work.

On February 21, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 10, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. A hearing commenced on May 21, 2014 but was continued at the Grievant's request and rescheduled for July 16, 2014.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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. 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 Tech employed Grievant as a Baker. She enjoyed her job immensely and was well-respected by her co-workers for her skills. She began working for the University as a wage employee in November 2011. She began working as a full time salaried employee effective January 10, 2012. Grievant received an orientation in January 2012. Grievant received an overall rating of "Strong Performer" as part of her 2012 performance evaluation.

Virginia Tech employees receive a Hokie passport to serve as an identification card and to enable them to "swipe" and enter locked doors on campus. The Hokie passport is the size of a credit card. It identifies each employee using a unique number. Grievant received general information regarding the Hokie passport as part of her employee orientation in January 2012.

Food serve employees have an account created under the Hokie passport to enable them to pay for food up to \$7.50 per day. An employee can obtain a meal only in the building in which he or she works. Employees are entitled to use the Hokie passport to buy food only on the days they are working. When an employee takes a lunch break, he or she may use the Hokie passport to draw from the account to pay for a meal.

The Hokie passport meal account automatically replenishes so that an employee could obtain a \$7.50 credit every day even on days the employee was not working. Because of the risk that employees could pay for food on non-work days, the University has a long standing policy that if an employee uses a meal card on a day off, the

employee will be removed from employment. The University's orientation for new food service employees involves review of this policy.

The GS Gold system is used to account for transactions in the Hokie passport such as payment for employee meals. The GS Gold system does not account for credit card transactions. The Micros system is a cash register financial transaction system.

Grievant worked in a building with several restaurants. Food purchases could be made only with credit cards or Hokie passports. Debit cards and cash could not be used to purchase food. If a customer presented a card that could be used as either a debit card or as a credit card, the restaurant would process the transaction as a credit card transaction. Grievant had such a bank card.¹

SG was one of the restaurants in the building. SG had space for a cashier to take food orders and process payments. The cashier was responsible for operating two terminals. One of those was a cash register that linked to the GS Gold accounting system. The other was a credit card machine that linked to a credit card company. If an employee purchased food at a restaurant, the Micros system would create a Check Detail showing the items keyed by the cashier for purchase. It would also show that the employee used his or her Hokie passport to pay \$7.50 towards the purchase price and used a credit card for the remaining balance.

On December 16, 2013, Grievant was not scheduled to work. Grievant's mother came to visit her. Grievant wanted to take her mother to her workplace.

Grievant and her mother entered the building on December 16, 2013 at approximately 11:20 a.m. and began to greet several of Grievant's co-workers. Grievant was not wearing her Baker's uniform. They wanted to purchase a meal to share. They walked to SG. Grievant selected a salad from the menu. At approximately 12:27 p.m., the cashier pushed the appropriate items on the register and printed off a receipt. The amount due from Grievant was \$10.34. Grievant gave her Hokie passport to the cashier who swiped the card in the cash register terminal.² After \$7.50 was deducted from the amount due, a balance of \$2.84 remained. Grievant gave her check card to the cashier and swiped the card using the credit card reader.

At approximately 1 p.m. on December 16, 2013, Grievant and her mother went to another restaurant in the building to purchase bread. Grievant's credit card was charged \$3.16 to pay for the bread.

The Assistant Director observed that Grievant ate at the Restaurant on her day off of work. His customary practice was to obtain a report from the Cash Office Supervisor to determine whether the employee had used his or her Hokie passport to

¹ Grievant's card was a "Check Card. It's the one card that does it all. Select 'Debit' or 'Credit' at the register – it's your choice." See, Agency Exhibit 8.

² Grievant's Hokie passport was swiped by the cashier. The number on the passport was not entered manually into the cash register.

purchase food. He asked the Cash Office Supervisor to print a report for Grievant. She did so and the report revealed that Grievant has used her Hokie passport to pay for part of her purchase of a meal on December 16, 2013.

Grievant was scheduled to work on December 17, 2013 but was unable to work due to illness. She notified the University of her illness prior to the beginning of her shift.

When Grievant returned to work, the Assistant Director informed Grievant that he believed Grievant had used her Hokie passport on her day off to purchase food contrary to policy. Grievant denied the allegation and asserted that she had used her credit card to pay the full amount of her meal. She told the Assistant Director that she “loved her job and would not risk losing it by doing something so stupid and ridiculous as paying for a salad with my meal card on my day off.”³ Grievant later presented a copy of her bank statement showing transactions on her check card. On December 17, 2013, \$2.84 was shown as a transaction on her bank card statement. The statement showed an additional transaction at another University restaurant in the amount of \$3.16.

Grievant received training regarding the University's employee handbook in November 2011. She knew that the consequences for using her Hokie passport to purchase food on a day she was not working included removal from employment.

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.”⁴ 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 University's handbook governs employee meals. This policy provides:

All salary and non-student wage employees will be provided meals or meal equivalencies for the days on which they work at minimum of 5.5 hours. You are not entitled to meals on your days off. Employees' meals are not transferable to a third party.

On December 16, 2013, Grievant was not working at the University. She used her Hokie passport to pay \$7.50 towards paying for a salad she purchased as SG. She used her credit card to pay for the remaining balance of \$2.84. Grievant acted contrary to the University's policy that specified that an employee could be removed from

³ Agency Exhibit 10.

⁴ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

employment for using a Hokie passport to purchase food on the employee's day off. The University has presented sufficient evidence to support the issuance of a Group III Written Notice with removal.

Grievant argued that she did not use her Hokie passport on December 16, 2013. She testified that she customarily kept her Hokie passport in a clear vinyl card holder that was attached to a lanyard she wore around her neck. She argued that she knew better than to use her Hokie passport on her day off because she loved her job and did not wish to place it in jeopardy.

The financial transaction histories of GS Gold, Micros, and the bank credit card show that Grievant made a transaction at SG and paid \$7.50 with her Hokie passport and \$2.84 with her credit card. This is the most logical interpretation of the evidence. Grievant claimed she made the transaction solely with her credit card and presented her bank statement to show her credit card payment. The bank statement, however, displayed a purchase of only \$2.84 which was consistent with the University's claim that Grievant used her Hokie passport to pay \$7.50 towards the \$10.34 food purchase.

Grievant argued that the financial transaction records were unreliable and had been "hacked" by someone with the intent of making it appear that she used her Hokie passport on December 16, 2013 when she had not done so. Grievant has not presented sufficient evidence to support this defense.

Grievant has not established that any employee was asked or encouraged to manipulate the University's computer transaction records. Grievant has not established that any employee with a motive to harm Grievant had access or the ability to alter the University's computer transaction records. The Cash Office Supervisor had read-only access to the GS Gold system and Nextvu/ Micros systems. She was the only person in the building with access to GS Gold. The Assistant Director could not access GS Gold which is why he asked the Cash Officer Supervisor to run a report on Grievant's use of her Hokie passport for December 16, 2013.

Grievant argued that someone such as the cashier may have entered by hand the numbers from her Hokie passport to show that she purchased food with the Hokie passport on her day off. The evidence showed that the Hokie passport was swiped by the cashier and that the cashier did not have the ability to enter the Hokie passport number without having a separate access code. The cashier also could not enter by hand credit card information into the credit card reader without using an access code and if that had occurred, the Micros system would have revealed that action.

Grievant argued that her bank check card had been hacked. She had to cancel her bank card because she observed unexpected charges being placed on her card. The charges reflected transactions in another state on days she had not been in that state.

The evidence showed that \$2.84 was processed on Grievant's bank card on December 17, 2013. This is consistent with the University's claim that Grievant used her bank card on December 16, 2013 to pay part of her food purchase at SG. The fact

that Grievant's bank billed her for charges placed on her card by another person in another state is not sufficient evidence to show that someone entered the bank's credit card system and changed her credit card purchase from \$10.34 to \$2.84 in order to get Grievant in trouble with her employer. The Hearing Officer does not believe that any University employees had sufficient knowledge and ability to alter Grievant's credit card transaction to change the amount of her bank card purchase from \$10.34 to \$2.84. The chance of this happening at the same time as someone altered Grievant's Hokie passport account to show her spending \$7.50 from that account is even more unlikely.

Grievant argued that at approximately 12:50 p.m. on December 16, 2013, she and her mother went to another restaurant in the building and purchased bread using her mother's credit card. The credit card of Grievant's mother was not charged for the transaction. Grievant's credit card showed a charge of \$3.16 from the restaurant which was an amount below the \$3.50 cost of the bread. This evidence is not sufficient to show that someone altered Grievant's credit card transactions.

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"⁵ 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.

Grievant had adequate notice of the consequences for purchasing food with the Hokie passport on a day she was not working. The University had a written policy prohibiting employees from using a Hokie passport to purchase food on days they were not working. A better management practice would have been for the University to set forth in writing the consequences for engaging in this behavior. The University failed to do so. The Assistant Director testified that it was a long standing policy for the University to terminate such employees. University managers informed Grievant that she would be removed from employment if she used her Hokie passport to purchase food on her day off. She acknowledged this through her written response to the University's allegations. She testified she knew she could be removed from employment for using her Hokie passport improperly. One witness testified that when she worked at another university, that university also had a policy that if an employee who used his or her meal credit on a day off would be removed from employment.

Grievant argued that other employees had been cooking their own food without permission yet the employees were not disciplined. The evidence presented was

⁵ *Va. Code § 2.2-3005.*

insufficient for the Hearing Officer to conclude that University employees were cooking their own food and that University managers were aware of this practice and let them remain employed. Even if the allegations were true, it is not clear that those employees would be similarly situated to Grievant's offense which involved use of the Hokie passport. Furthermore, the University presented several examples of having removed employees who used their Hokie passport to purchase meals while they were not working.

Grievant argued that the Assistant Director and some other managers may have had "something against me." The Assistant Director testified that he liked Grievant and believed she did good work. He testified that it was his customary practice to check whether employees had used their Hokie passports to purchase food when he observed employees eating at the University's restaurants. His testimony was credible. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

This outcome of this case is unfortunate. Grievant was a talented and capable employee. The University could have adequately addressed its concerns about her behavior using lesser disciplinary action than removal. The Hearing Officer is not a "super-personnel officer" who can substitute a better, more logical outcome for that of an agency's disciplinary action.

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 **upheld**.

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 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 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before

the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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

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 provide a copy of all of your appeals to the other party, EDR, 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.

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.⁶

[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

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.