

Issues: Group II Written Notice (failure to follow policy and unauthorized use of State property), and Group III Written Notice with Termination (abuse of State time and failure to follow policy); Hearing Date: 06/18/14; Decision Issued: 07/08/14; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No.10369; Outcome: Partial Relief.



# **COMMONWEALTH of VIRGINIA**

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

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

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

In re:

**Case Number: 10369**

Hearing Date: June 18, 2014

Decision Issued: July 8, 2014

#### **PROCEDURAL HISTORY**

On March 26, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy and unauthorized use of State property. On March 26, 2014, Grievant was issued a Group III Written Notice of disciplinary action for abuse of State time and failure to follow policy.<sup>1</sup> Grievant was removed from employment effective March 26, 2014.<sup>2</sup>

On April 25, 2014, Grievant timely filed a grievance to challenge the Agency's actions. The matter proceeded to hearing. On May 20, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 18, 2014, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Representative

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<sup>1</sup> The Agency included many unrelated policy violations and factual scenarios several of which do not rise to the level of disciplinary action. The Hearing Officer will address only those matters giving rise to disciplinary action.

<sup>2</sup> The Agency failed to specify on a Written Notice that it has terminated Grievant.

Witnesses

## **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Virginia Department of Transportation employed Grievant as an Advertising and Procurement Coordinator. She began working for the Agency in January 2007. The purpose of her position was:

Primarily to place VDOTs non-employment advertisements for public involvement and business opportunities, to procure non-travel related goods and services for the Public Affairs division, and to reconcile invoices with requisitions. Serve as back-up for certain functions within the division.<sup>3</sup>

Grievant had a flexible work schedule. She could complete some of her duties after customary work hours and in locations other than the Agency's offices.

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<sup>3</sup> Grievant Exhibit 1.

The Agency had a State vehicle available for its staff. Employees were to reserve the vehicle and expected to use the vehicle only for Agency business reasons. Grievant checked out the State vehicle from January 16, 2014 through January 21, 2014. She also used the State vehicle from February 28, 2014 through March 5, 2014.

The Agency placed a GPS tracking device on the State vehicle and was able to monitor where Grievant drove the vehicle. On a weekend, Grievant would take the vehicle to several retail shopping centers. The vehicle would remain there for several hours without purchases being made on the Agency's credit card. The Agency inferred that Grievant was using the State vehicle to shop for personal items. There were times, however, when Grievant would use the vehicle to make purchases of food, water, and supplies to help the Agency successfully provide employee training sessions.

The Agency challenged Grievant's use of the State vehicle. Grievant acknowledged, "I picked up my daughter in the state vehicle as I felt pressed for time and from the direction I was driving the childcare location was en route to my home."

On July 25, 2013, Grievant received an Agency credit card. She signed an agreement specifying, "I understand that I am being entrusted with a valuable purchasing tool and will be making financial commitments on behalf of my agency and will strive to obtain the best value for the agency by using State contracts and other "preferred suppliers" as identified in the Agency's Purchasing Department."<sup>4</sup>

From March 25, 2013 through December 30, 2013, Grievant made 20 purchases using the credit card for which the Agency questioned. Twelve of the purchases lacked receipts to support the purchases. Several of the items purchased were for personal items. When the Agency claimed Grievant made personal use of the credit card, Grievant responded to the Agency's allegations of misuse by saying, "I acknowledge that I did use the card for non-business related purchases ...." During the hearing, Grievant estimated the amount of her personal expenditures using the Agency's credit card to be approximately \$350.

## **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>5</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

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<sup>4</sup> Agency Exhibit 3.

<sup>5</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

### Group II Written Notice

Failure to follow policy is a Group II offense. Unauthorized or misuse of State property is a Group II offense.<sup>6</sup>

The Office of Fleet Management Services Policies and Procedures Manual governs use of a State vehicle. Section 2(II)(B) provides:

Drivers shall use state-owned vehicles for official state business only. Drivers guilty of misuse are subject to disciplinary action by their agency and may lose their privilege to operate state-owned vehicles. Vehicles are to be operated in a manner which avoids even the appearance of impropriety.

Section 2(II)(C) provides:

Family members of state employees are prohibited to ride in state-owned vehicles unless the family member’s travel is directly related to official state business.

Grievant acted contrary to policy when she used the Agency’s vehicle to conduct personal shopping trips. She acted contrary to policy when she permitted her daughter to ride as a passenger in the vehicle. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

### Group III Written Notice

The Agency issued Grievant a Group III Written Notice for abuse of state time and failure to follow policy. Abuse of State time is a Group I offense. Failure to follow policy is a Group II offense. Neither are Group III Offenses and, thus, a Group III Written Notice cannot be sustained.<sup>7</sup>

The Agency did not present sufficient evidence to show that Grievant abused State time. Grievant had a flexible work schedule and would sometimes work from her home or outside of normal work hours.

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<sup>6</sup> See, Attachment A, DHRM Policy 1.60.

<sup>7</sup> There may have been sufficient evidence to support a Group III Written Notice if the Agency had properly alleged a Group III offense. The Hearing Officer will not take action that serves to re-draft poorly drafted written notices.

CAPP Manual 20355 governs Cash Disbursements Accounting and provides, “Agencies assume ultimate liability for the employee’s use of the card. Use of the card for personal items, cash advances, or business travel expenses is prohibited.”

Grievant signed an agreement informing her she was receiving a valuable purchasing tool to make financial commitments on behalf of the Agency. It should have been obvious to her that the credit card was intended to be used solely for Agency purchases. Grievant used the Agency’s credit card to purchase items for herself. The Agency has presented sufficient evidence to show that Grievant should receive a Group II Written Notice for failure to comply with policy governing her use of the Agency’s credit card.

*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>8</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 further the disciplinary action.

### Other Relief

Grievant and the Agency entered into a Repayment agreement for Small Purchasing Credit Card Items so that Grievant could repay the items she purchased for her personal use using the credit card. The amount to be repaid was \$988.99. The Agreement also provided that 56 hours would be deducted from her annual leave balance to cover the discrepancy of hours worked. The funds were deducted from Grievant’s paychecks.

Grievant argued that she entered the agreement under duress and that the amount actually due to the Agency was less than what she agreed to pay under the contract. Grievant does not have the authority to revise a separate contract that partially resolved some of the matters in dispute between the parties. Grievant’s request for relief is denied.

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<sup>8</sup> *Va. Code § 2.2-3005.*

Grievant sought to have the Agency compelled to permit her to resign without indication that it was in lieu of termination. The Hearing Officer lacks the authority to order the Agency to take such action.

The Agency paid Grievant for her leave balances but withheld amounts under the Repayment Agreement. The Agency made a lump sum payment into Grievant's bank account and then retracted and reissued the payment in a smaller amount. The evidence showed that the Agency initially incorrectly accounted for the internal revenue service requirements regarding lump sum payments. The second amount paid was correct even though it withheld additional monies to account for Grievant's tax liability.

### **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow policy is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for failure to follow policy is **reduced** to a Group II Written Notice. Grievant's removal is **upheld** based on the accumulation of disciplinary action. Grievant's request for relief with respect to the Repayment Agreement 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 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

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 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 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.<sup>9</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>9</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.