Issue: Group II Written Notice (failure to comply with established written policy); Hearing Date: 01/08/07; Decision Issued: 01/09/07; Agency: ODU; AHO: David J. Latham, Esq.; Case No. 8477; Outcome: Agency upheld in full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8477

Hearing Date: January 8, 2007
Decision Issued: January 9, 2007

APPEARANCES

Grievant
Two witnesses for Grievant
Interim Assistant Dean
Attorney for Agency
Two witnesses for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group II Written Notice issued for failure to comply with established written policy.[1] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2] Old Dominion University (Hereinafter referred to as "agency") has employed grievant as an administrative assistant for nine years.

State policy provides that employees must use State computer systems only in accordance with State and agency policy and, maintain conditions of security under which they are granted access to the systems.[3] Agency policy provides that all work on computers will be done through an appropriately-established account. Once an account is established, the use of that account is restricted to the account holder.[4] In an emergency, however, there could be exceptions but only with prior approval. Requests for a waiver must be submitted to the department administering accounts for that system. Actions which attempt to circumvent prescribed channels to obtain computer resources are prohibited.

The agency utilizes a computer software system known as Banner to schedule classrooms for courses, assign course identification numbers, assign instructors to courses, and for budgeting. Employees are given access to Banner on an as-needed basis to perform their functions. Each employee is assigned an account and password to access the system. Access may be further restricted to inquiry-only for those who need information from the system but who do not have a need to input or change information. Schedulers whose access has been restricted to inquiry-only are still able to complete their scheduling responsibilities using a manual method that takes a little longer.

On April 27, 2006, the associate registrar sent an e-mail to a large number of employees who use Banner for scheduling. The e-mail was sent directly to some people, as a "cc" to other employees, and as a "bcc" to still other people. The e-mail was brief and stated, in pertinent part, "Note: If you receive this email as a bcc, your update access to Banner Scheduling will not be activated until you complete training in May."[5] Grievant was among the nine employees who received the e-mail as a "bcc." Grievant received and read the e-mail. A training refresher course was scheduled for May 17, 2006.

On May 9, 2006, grievant attempted to access the Banner scheduling system but could only get access to the query mode. She e-mailed the associate registrar to ask why and then, half an hour later, again e-mailed her to ask

---

[1] Agency Exhibit 4. Group II Written Notice, issued July 10, 2006. [NOTE: Although the Written Notice states that the date of issuance was July 10, it appears from the signature line that it was not actually issued until July 14, 2006.]

[2] Agency Exhibit 8. Grievance Form A, filed August 8, 2006.

[3] Agency Exhibit 7. Department of Human Resource Management (DHRM) Policy 1.75, *Use of Internet and Electronic Communications Systems*, August 1, 2001.

[4] Agency Exhibit 8. Policy 3502, *Computer Ethics*, July 1, 2000.

[5] Agency Exhibit 2. E-mail from associate registrar to several employees, April 27, 2006.

whether she needed the refresher course.[6] Shortly thereafter, the registrar responded in the affirmative. On May 10, 2006, grievant told a scheduler in a different department that she was having problems with her computer and asked to use her computer. When grievant went to see the coworker, the coworker had been logged onto Banner under her own password to do scheduling for her own department. The supervisor then called the coworker away from her desk to speak with her. The coworker forgot to log off her own scheduling access before leaving. Grievant then used the coworker's computer to do her own scheduling tasks. Although grievant knew that her access had been restricted, she wanted to get her scheduling completed as soon as possible.

The Office of Computer and Communications Services produces a daily printout of scheduling activities performed by each scheduler. The associate registrar receives these printouts daily but she did not review the reports for May 10, 2006. On June 22, 2006, someone brought to the associate registrar's attention that the coworker's audit printout included scheduling of courses that are in grievant's area of responsibility.[7] The associate registrar immediately suspended the coworker's access.[8] Because grievant's immediate supervisor was out of the office on vacation, she notified the interim assistant dean about what had occurred. Subsequently, the associate registrar told the assistant dean that she recommended terminating grievant's employment. The assistant dean spoke with grievant who readily acknowledged that she had used the coworker's computer to schedule classes.

The coworker was counseled because she had forgotten to log off her computer before allowing grievant to work on it[9].

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

---

[6] Agency

[7] Agency Exhibit 5. Printout of Banner access via coworker's password, May 10, 2006.

[8] When the assistant dean learned that the coworker just forgot to log off, she realized that the coworker had not intentionally violated any policy and requested the associate registrar to reactivate the coworker's access to Banner scheduling.

[9] Agency Exhibit 1. Coworker's Counseling Memorandum, July 10, 2006.

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[10]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated *Standards of Conduct* Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.[11] Failure to comply with established written policy is a Group II offense.

The agency has shown, by a preponderance of evidence, that grievant accessed the Banner scheduling function utilizing a coworker's computer which the coworker had left logged on to Banner. This was clearly contrary to written policy which provides that only the accountholder may use the account. Having shown that there was a violation of policy, the remaining issue is whether grievant's access was accidental or knowing.

Grievant contended during the hearing that she was not deliberately attempting to circumvent policy - she just tried to get into the system and it allowed her to do so. Grievant's contention is not persuasive for two reasons. First, she knew that her access had been suspended and admitted that she just wanted to get the scheduling done as soon as possible. Second, she maintained during the hearing that she did not know that her access had been suspended. However, in her June 28th memorandum, grievant did not assert that she was

[10] § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.
[11] Agency Exhibit 6. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

unaware her access had been suspended. If grievant was truly unaware of her access suspension, it is more likely than not that she would have included that argument in her response memorandum.

Grievant averred during the hearing that she signed onto Banner using her own password when she borrowed the coworker's computer. However, the fact is that grievant used the Banner access that her coworker had left open – not grievant's own access.[12] Moreover, the evidence is uncontroverted that grievant's access and those of eight other employees had been suspended on April 27, 2006. Thus, it would not have been possible for grievant to access the scheduling function with her own password. Grievant suggests that sometimes the Banner system has "black holes" that might permit her access despite the fact that access had been suspended. However, grievant has offered no documents, witnesses, or other evidence to corroborate this assertion. While the hearing officer does not purport to be a computer expert, years of experience with various computer programs (with and without 'Black Holes') strongly suggest that security access programs do not turn on and off by themselves.

Grievant asserted that she did not realize that she was one of those who received a "bcc" of the April 27, 2006 e-mail from the associate registrar. It is difficult to imagine that grievant could have read the e-mail and then failed to carefully examine the addressee information to determine whether she was one whose access had been suspended. Moreover, grievant's e-mail of May 9, 2006 suggests that she *had* read the e-mail and *knew* she was suspended because she asked the associate registrar if she needed refresher training.

Grievant did not like the fact that her disciplinary action was discussed by supervisory people outside her immediate chain of command, believing that it was a violation of her right of confidentiality. There are two factors which resulted in involving other supervisors. First, grievant's immediate supervisor was on vacation at the time the infraction was discovered. Second, there are overlapping supervisory responsibilities. The registrar's office is responsible for overseeing certain portions of the information in Banner, even though grievant's immediate supervisor is not in the registrar's office. On the other hand, it appears that the associate registrar was more involved in the disciplinary process than she had a right to be. There does not appear to be any basis for her making a recommendation to terminate grievant's employment since she is not in grievant's direct chain of command.[13] Grievant asserts that there was a "hostile history" between her and the associate registrar. This appears to be corroborated by the associate registrar's unwillingness to admit under oath that she had recommended grievant be discharged.

Grievant did not proffer any specific policy that requires confidentiality of disciplinary actions. However, the hearing officer takes administrative notice of

[12] This is documented in Exhibit 5.

[13] The associate registrar's testimony that she did not a recommendation to terminate is deemed less credible than the assistant dean's testimony that she did make such a recommendation.

the fact that the Department of Human Resource Management and all state agencies do, in fact, strive to treat all personnel matters (particularly discipline) as confidential. The evidence in this case does not show that the assistant dean deliberately violated grievant's right of confidentiality when she discussed the case with Human Resources and others. On the other hand, it does appear that others may have been more involved than necessary and/or may have discussed the disciplinary action "out of school." The agency may wish to examine this issue and renew its commitment to confidentiality through training or other means deemed appropriate by Human Resources.

Mitigation

The normal disciplinary action for a Group II offense is a Written Notice, or a Written Notice and up to 10 days suspension. The *Standards of Conduct* policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has both long state service and otherwise satisfactory work performance. According to the assistant dean, grievant is well loved by the faculty in her department. The assistant dean also considered that grievant was not attempting to circumvent the policy for any personal gain – she just wanted to get the job done; all of the testimony and evidence in this case support this observation. On the other hand, the assistant dean was troubled that grievant admitted that "I tried on an infrequent basis to access scheduling just in case BANNER was opening up one of its many 'black holes.'"[14] This strongly suggests that grievant's use of the coworker's Banner access was not accidental. The assistant dean also considered that the coworker's offense was one of omission (forgetting to log off) and, therefore, less serious than grievant's offense of commission (knowingly using the coworker's access to Banner). After carefully reviewing the circumstances of this case, it is concluded that the agency appropriately applied the mitigation provision.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on July 10, 2006 is hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this decision was issued, if any of the following apply:

[14] Agency Exhibit 3. Memorandum from grievant to assistant dean, June 28, 2006.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.[15] 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.[16] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[15] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[16] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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/David J. Latham

_____
David J. Latham, Esq.
Hearing Officer