Issues: Group I Written Notice (Insubordination), Group II Written Notice (Insubordination and Abuse of State Time), Group III Written Notice (Unsatisfactory Work Performance, Failure to Follow Policy, Interference with Operations), and Termination due to accumulation; Hearing Date: 04/08/10; Decision Issued: 04/13/10; Agency: Longwood University; AHO: Carl Wilson Schmidt, Esq.; Case No. 9228; Outcome: Partial Relief; **Administrative Review: AHO Reconsideration Request received 04/28/10; Reconsideration Decision issued 07/06/10; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 04/28/10; DHRM Ruling issued 07/27/10; Outcome: Declined to review; Second DHRM Ruling Request received 07/29/10; DHRM Ruling issued 08/18/10; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9288

Hearing Date: April 8, 2010
Decision Issued: April 13, 2010

PROCEDURAL HISTORY

On November 6, 2009, Grievant was issued three Written Notices. First, Grievant was issued a Group I Written Notice of disciplinary action for insubordination. Second, Grievant was issued a Group II Written Notice of disciplinary action for abuse of state time and insubordination. Third, Grievant was issued a Group III Written Notice of disciplinary action for unsatisfactory work performance, failure to follow established policy, and interference with State operations. Grievant was removed from employment effective November 11, 2009.

On November 20, 2009, 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 March 9, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 8, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Counsel
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 actions, 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 actions against the Grievant were 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:

Longwood University employed Grievant as an Administrative Office Specialist III. Grievant had been employed by the Agency for approximately 17 years. Grievant worked on a full-time basis for the past ten years. The purpose of her position was:

> Academic Record Maintenance - Review student academic records in the Banner Student Information system for accuracy and in preparation for releasing per student written request.
>
> Course Registration - First contact for Consortium and other non-degree student course registration.
>
> Faculty Petitions Committee - Review and prepare student appeal request for the Faculty Editions Committee.[1]

[1] Grievant Exhibit 1.

Grievant received an overall rating of Contributor in her October 7, 2009 performance evaluation. Grievant had prior active disciplinary action. On March 5, 2007, Grievant received a Group II Written Notice of disciplinary action with suspension for failure to follow instructions and/or policy.

When Grievant received documents for processing, checks would sometimes be attached to the documents. Sometimes Grievant would give the checks to the Receptionist who would take the checks to the cashiering department to be deposited. On other occasions, Grievant would take the checks to the cashiering department. On July 8, 2009, the Agency held a staff meeting during which employees were informed that they should not take checks to the cashiering department but rather should give the checks to the Receptionist who would take the checks to the cashiering department for deposit. Grievant did not attend that staff meeting. Several days after the staff meeting, the Receptionist informed Grievant that the Receptionist was to take all checks to the cashiering department from that point on. Grievant continued to take checks she received directly to the cashiering department. Only on some occasions did she give the checks to the Receptionists to take to the cashiering department. On November 5, 2009 during a verbal warning meeting with Grievant, Grievant was asked, "What is happening with any monies received to your area of responsibility?" Grievant responded that she was collecting them and personally delivering them to cashiering and student accounts.

The Registrar joined the Agency on January 5, 2009. He soon began receiving complaints from Grievant's coworkers that Grievant spent too much time on the telephone making personal calls. When Grievant spent time making personal telephone calls using the Agency's telephone, Grievant was unavailable to answer incoming business-related telephone calls. Other employees would have to answer those calls thereby impacting their work duties. On February 18, 2009, the Registrar held a staff meeting which Grievant attended. During that meeting, the Registrar informed staff that they should minimize their personal use of the Agency's telephones during work hours. He did not specify the amount of time that each employee was limited to for personal phone calls. At some point in 2009, the Registrar was given the ability to determine the length of time each employee spent making personal phone calls using the Agency's telephones. The Registrar calculated the personal telephone use for all of his employees. For the period from August 1st through October 31st, 2009, Grievant made approximately 5.68 hours of personal outgoing local telephone calls using the Agency's telephone line. Grievant had the highest personal use when compared to the other employees in her unit. On October 15, 2009, the Registrar sent employees in the office an email with a copy of the Agency's policy governing telephone usage. The email stated, in part:

> This is the second reminder about the use of University phones for personal local and long-distance calls. Personal long-distance calls may not be charged to Longwood University accounts. I am distributing copies of your individual phone-line usages for the past month period please review and identify with a highlighter your personal calls.

- For personal phone long-distance charges, you must go to the Cashiering and submit payment.
- For personal phone local calls, pay close attention to the amount of time spent on personal calls so it is not excessive. Beginning immediately, personal calls are to be limited to emergencies only.
- Time spent on personal calls is time away from Longwood University job responsibilities.[2]

After October 15, 2009, Grievant did not use the Agency's telephones for personal use.

Student H1 and Student H2 had the same first and last names. The Agency distinguished these two students using different numbers called L numbers. On April 20, 2009, Grievant registered Student H1. The correct student to register, however, was Student H2. Grievant incorrectly registered Student H1 because she received an instruction from Ms. A, Administrative Assistant, to register Student H1. On April 29, 2009, Ms. A sent Grievant an email stating:

> Please register [Student H2] for Partnership. The problem with the previous registration was that I had an incorrect L#. Sorry for any inconvenience. Thanks for your help.[3]

Grievant's Employee Work Profile required that she "[r]eview and process registrations within 24 hours …."[4] Grievant did not timely register Student H2 as requested by Ms. A. Grievant did not remove Student H1.

On June 5, 2009, Grievant removed the registration for Student H1 but then re-registered Student H1 that same day period. It appears that Grievant made this entry to make Student H1's record more manageable.

On August 10, 2009, the Agency's Accounts Receivable department placed a Hold[5] on the account of Student H1.

On August 25, 2009, Grievant correctly registered Student H2 but failed to remove Student H1 from registration.

In October 2009, the Agency discovered that Student H1 remained registered in error. On October 30, 2009, the Assistant Director sent an email to the Registrar asking that Student H1 be removed from the course roster. The Registrar had to take a

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[2] Agency Exhibit 8.

[3] Agency Exhibit 12.

[4] Grievant Exhibit 1.

[5] Having a Hold meant the student could not register for classes or obtain a transcript.

retroactive action to accomplish the removal. The Agency considers retroactive actions to be significant amendments to its records and to be avoided whenever possible. Retroactive actions may result in audit points from Internal and External Auditors. The retroactive action remained a permanent part of Student H1's student record.

On September 1, 2009, Grievant registered Student B for the wrong class. She bypassed a Hold on the student's account. Once the error was identified, Grievant corrected the registration on November 6, 2009 by removing the incorrect registration and adding proper registration. The Agency had to take a retroactive action to correct the error. The Agency overcharged Student B as a result of the error.

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."[6] 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."

Group I Written Notice

The Agency contends that Grievant was insubordinate because she continued to take checks directly to the cashiering department instead of giving them only to the Receptionist. To establish insubordination, the Agency must show that an employee showed contempt or disregard of a supervisor's authority to give instructions to or command of subordinate employees. In this case, the Agency has not established insubordination by Grievant. Grievant did not attend the staff meeting on July 8, 2009 during which the Registrar gave the instruction to staff. Although the Receptionist informed Grievant of the change in practice, the evidence is insufficient to show that the Receptionist told Grievant that the change in practice was a mandate from the Registrar. The evidence is insufficient to show that Grievant disregarded the Registrar's instruction in a manner to show a disregard of the Registrar's authority as a supervisor. The Group I Written Notice must be reversed.

The Agency argued that Grievant was obligated to learn the information in the July 8, 2009 staff meeting. The Registrar sent an email to staff including Grievant indicating that if they missed a staff meeting it was their responsibility to obtain the information disseminated during the meeting. The email was sent August 20, 2009, more than a month after the July 8, 2009 staff meeting. Nothing in the email suggested that Grievant was expected to find out information she had missed from prior staff

[6] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

meetings. Grievant's interpretation that the email applied only with respect to future staff meetings was a reasonable interpretation.

Group II Written Notice

The Agency contends that Grievant's personal phone use of the Agency's telephones was excessive and should result in the issuance of a Group II Written Notice. The difficulty with the Agency's case is that it did not give Grievant sufficient notice of what amount of time it would consider as excessive personal use. Personal use of 5.68 hours over a three month period (approximately 480 hours of scheduled work) is not in itself so egregious that Grievant knew or should have known that her personal use was excessive.[7] Although four of 10 coworkers complained to the Registrar about Grievant's personal use, the Registrar did not tell Grievant that her personal use was excessive and disruptive to the Agency's business. When the Registrar sent an email to staff on October 15, 2009 advising them not to make personal use of the Agency's telephones except for emergencies, Grievant discontinued her personal use of the Agency's telephones. Grievant's October 7, 2009 performance evaluation does not mention that her personal use of the Agency's telephones was inappropriate or disrupted to the Agency's business. In short, the Agency failed to provide Grievant with adequate notice that her behavior would result in disciplinary action. There is no basis to issue a Group II Written Notice of disciplinary action to Grievant. That Written Notice must be reversed.

Group III Written Notice

Grievant did not correctly register Student H2 within 24 hours of receiving a notice to do so. Grievant failed to remove properly Student H1 from classes. The consequences to Student H1 were that she was inappropriately registered for classes for which she should not have been registered. She had a Hold history that was inaccurate and a permanent part of her record. Her account could have been placed into Collections costing the Agency additional collections fees as well as lost revenue.[8] Student H1's record reflects a retroactive action. Retroactive actions may result in audit points from Internal and external Auditors. The consequence to Student H2 was that she was not registered for her classes until August 25, 2009. The first day of classes was August 24, 2009. Because of the late registration, Student H2 was placed at risk of not being able to register for classes of her first choice.

Grievant did not correctly register Student B. The Agency overcharged Student B. Correcting the error resulted in a retroactive action.[9]

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[7] In September 2009, Grievant's mother was receiving medical treatment that required Grievant to devote additional time contacting medical providers and her mother during work hours.

[8] Student H1 was billed mistakenly approximately 11 times in the amount of approximately $4,000.

[9] The Agency also alleged that Grievant engaged in an error with respect to Student M. The Agency has not established this assertion. It is not clear that Grievant was aware of Student M and in a position to correct the error.

When an employee fails to comply with her Employee Work Profile, the employee has engaged in unsatisfactory work performance. Unsatisfactory work performance is usually a Group I offense. The question becomes whether the Agency can elevate a Group I offense to a higher level, and if so, whether a Group I offense can be elevated to a Group III offense.

DHRM Policy 1.60(B)(2) provides:

> Note: Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms. Refer to Attachment A for specific guidance.

Based on this language, it is clear that Grievant's error may be elevated from a Group I offense to a higher level offense depending on the impact to the Agency. Grievant's errors significantly impacted the Agency's operations. She created inaccurate permanent records for Student H1 and Student H2. She placed Student H1 at risk of being placed in the collection status and Student H2 of being unable to register for her preferred classes. The Agency was forced to make a retroactive adjustment which may have resulted in an audit point with the External and Internal auditors. The disciplinary action given to Grievant should be higher than a Group I Written Notice.

Attachment A DHRM Policy 1.60 provides:

> *Note that in certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.) Similarly, in rare circumstances, a Group I may constitute a Group II where the agency can show that a particular offense had an unusual and truly material adverse impact on the agency. Should any such elevated disciplinary action be challenged through the grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above.

This language suggests that in certain extreme circumstances, an Agency may elevate a Group I to a Group II offense and a Group II to a Group III offense. It does not appear to authorize an agency to elevate a Group I offense to a Group III offense. Accordingly, Grievant should receive a Group II Written Notice of disciplinary action.

Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Grievant had prior active disciplinary action consisting of a Group II Written Notice. With a second Group II Written Notice, the Agency's decision to remove Grievant from employment must be upheld.

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 Employment Dispute Resolution…."[10] 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 Group II Written Notice.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded.** The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Grievant's removal is **upheld** based upon the accumulation of disciplinary action.

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 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

[10] *Va. Code § 2.2-3005.*

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

3. If you believe that 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. Please address your request to:

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
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 a copy of all of your appeals to the other party and to the EDR Director. 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. 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.[11]

[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

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9288-R

Reconsideration Decision Issued: July 6, 2010

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant contends that at most she should receive a Group I Written Notice not a Group II Written Notice. Grievant was informed on April 29, 2009 that the L number for student H1 and H2 had been reversed. Grievant did nothing to correct the error even though she had been advised of the error. It should have been obvious to Grievant that student H1 was registered incorrectly and that student H2 should have been registered. Grievant should have taken action with respect to student H1 and student H2 shortly after learning of the error on April 29, 2009. The Agency did not discipline Grievant merely because she did not timely resolve the error. The Agency also disciplined Grievant because of the consequences of the error. The Agency was authorized under

DHRM Policy 1.60 to make this distinction. Had other Agency employees not discovered the error, it is not clear that Grievant ever would have discovered the error. Similar analysis applies with respect to student B. Grievant made a registration error that she did not discover but which resulted in student B being overcharged. It is not necessary for the Agency to show it suffered actual damages from Grievant's behavior. Establishing a unique impact is sufficient. The Agency presented sufficient evidence to show that the impact on the Agency was sufficient to elevate the disciplinary action from a Group I to the Group II Written Notice.[12]

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied.**

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

_____

Carl Wilson Schmidt, Esq.
Hearing Officer

[12] Grievant argues that she continued to receive erroneous instructions to register students H1 which created a mitigating circumstance. If the Hearing Officer assumes for the sake of argument that a mitigating circumstance exist with respect to student H1, a basis to discipline remains because no mitigating circumstances were established with respect to student H2 and student B.

In the Matter of
Longwood University

July 27, 2010

The grievant, through her representative, has requested that this Department (DHRM) administratively review the hearing officer's decision in Case No. 9288. Because the grievant's request for administrative review was untimely, this Department will not review the hearing officer's decision. The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to this request for an administrative review.

This case involves a grievant who received a Group I Written Notice, a Group II Written Notice and a Group III Written Notice with termination. The hearing decision was issued on April 13, 2010. The hearing decision rescinded the Group I Written Notice and the Group II Written Notice. In addition, the hearing decision reduced the Group III Written Notice to a Group II Written Notice. However, because the grievant had other active disciplinary actions that were sufficient to sustain termination, she was not reinstated to her position.

By letter dated April 28, 2010, and received by this Agency on April 30, 2010, the grievant, through her representative, requested an administrative review. According to the Grievance Procedure Manual, "all requests for review must be made in writing, and ***received*** by the administrative reviewer, within 15 calendar days of the date of the original hearing decision."[13] Further, the April 13, 2010 hearing decision clearly advised all parties that any request they may file for administrative review to the hearing officer, DHRM or EDR must be received by the reviewer within 15 calendar days of the date the original decision was issued.[14] Here, however, the DHRM received the grievant's appeal for administrative review on April 30, 2010 which exceeds the 15 calendar days by two days. Accordingly, the grievant's request for administrative review by this Agency is untimely.

Ernest G. Spratley

[13] *Grievance Procedure Manual* § 7.2(a)
[14] Hearing Officer Decision, Case No. 9288, issued on April 13, 2010, p. 8-9.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
Longwood University

August 17, 2010

The grievant, through her representative, has requested an administrative review of the hearing officer's decision in Case No. 9288. The grievant is challenging the decision because she believes the hearing decision is inconsistent with Department of Human Resource Policy No. 1.60, Standards of Conduct, which allows "Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms." The grievant also feels that there were mitigating circumstances that should have been considered. For the reasons stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has asked that I respond to this request for an administrative review.[*]

FACTS

On November 6, 2009, the grievant was issued three Written Notices: (1) a Group I Written Notice of disciplinary action for insubordination. (2) a Group II Written Notice of disciplinary action for abuse of state time and insubordination; and, (3) a Group III Written Notice of disciplinary action for unsatisfactory work performance, failure to follow established policy, and interference with State operations. Grievant was removed from employment effective November 11, 2009.

According to the hearing decision, on February 9, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for the following:

> Longwood University employed Grievant as an Administrative Office Specialist III. Grievant had been employed by the Agency for approximately 17 years.

[*] This Department originally denied the grievant's request to conduct this review because our records show that the request received by DHRM was untimely. (See DHRM Ruling dated July 27, 2010). However, since that time, the grievant has submitted documentation to support that the request was received by DHRM within the requisite time period.

Grievant worked on a full-time basis for the past ten years. The purpose of her position was:

Academic Record Maintenance - Review student academic records in the Banner Student Information system for accuracy and in preparation for releasing per student written request.
Course Registration - First contact for Consortium and other non-degree student course
Faculty Petitions Committee - Review and prepare student appeal request for the Faculty Petitions Committee.

Grievant received an overall rating of Contributor in her October 7, 2009 performance evaluation. Grievant had prior active disciplinary action. On March 5, 2007, Grievant received a Group II Written Notice of disciplinary action with suspension for failure to follow instructions and/or policy.

When Grievant received documents for processing, checks would sometimes be attached to the documents. Sometimes Grievant would give the checks to the Receptionist who would take the checks to the cashiering department to be deposited. On other occasions, Grievant would take the checks to the cashiering department. On July 8, 2009, the Agency held a staff meeting during which employees were informed that they should not take checks to the cashiering department but rather should give the checks to the Receptionist who would take the checks to the cashiering department for deposit. Grievant did not attend that staff meeting. Several days after the staff meeting, the Receptionist informed Grievant that the Receptionist was to take all checks to the cashiering department from that point on. Grievant continued to take checks she received directly to the cashiering department. Only on some occasions did she give the checks to the Receptionists to take to the cashiering department. On November 5, 2009, during a verbal warning meeting with Grievant, Grievant was asked, "What is happening with any monies received to your area of responsibility?" Grievant responded that she was collecting them and personally delivering them to cashiering and student accounts.

The Registrar joined the Agency on January 5, 2009. He soon began receiving complaints from Grievant's coworkers that Grievant spent too much time on the telephone making personal calls. When Grievant spent time making personal telephone calls using the Agency's telephone, Grievant was unavailable to answer incoming business-related telephone calls. Other employees would have to answer those calls thereby impacting their work duties. On February 18, 2009, the Registrar held a staff meeting which Grievant attended. During that meeting, the Registrar informed staff that they should minimize their personal use of the Agency's telephones during work hours. He did not specify the amount of time that each employee was limited to for personal phone calls. At some point in 2009, the Registrar was given the ability to determine the length of time each employee spent making personal phone calls using the Agency's telephones. The Registrar

calculated the personal telephone use for all of his employees. For the period from August 1st through October 31st, 2009, Grievant made approximately 5.68 hours of personal outgoing local telephone calls using the Agency's telephone line. Grievant had the highest personal use when compared to the other employees in her unit. On October 15, 2009, the Registrar sent employees in the office an email with a copy of the Agency's policy governing telephone usage. The email stated, in part:

> This is the second reminder about the use of University phones for personal local and long-distance calls. Personal long-distance calls may not be charged to Longwood University accounts. I am distributing copies of your individual phone-line usages for the past month period please review and identify with a highlighter your personal calls.
>
> • For personal phone long-distance charges, you must go to the Cashiering and submit payment.
>
> • For personal phone local calls, pay close attention to the amount of time spent on personal calls so it is not excessive. Beginning immediately, personal calls are to be limited to emergencies only.
>
> • Time spent on personal calls is time away from Longwood University job responsibilities.

After October 15, 2009, Grievant did not use the Agency's telephones for personal use.

Student H1 and Student H2 had the same first and last names. The Agency distinguished these two students using different numbers called L numbers. On April 20, 2009, Grievant registered Student H1. The correct student to register, however, was Student H2. Grievant incorrectly registered Student H1 because she received an instruction from Ms. A, Administrative Assistant, to register Student H1. On April 29, 2009, Ms. A sent Grievant an email stating:

> Please register [Student H2] for Partnership. The problem with the previous registration was that I had an incorrect L#. Sorry for any inconvenience. Thanks for your help.

Grievant's Employee Work Profile required that she "[r]eview and process registrations within 24 hours …." Grievant did not timely register Student H2 as requested by Ms. A. Grievant did not remove Student H1.

On June 5, 2009, Grievant removed the registration for Student H1 but then re-registered Student H1 that same day period. It appears that Grievant made this entry to make Student H1's record more manageable.

On August 10, 2009, the Agency's Accounts Receivable department placed a Hold on the account of Student H1.

On August 25, 2009, Grievant correctly registered Student H2 but failed to remove Student H1 from registration.

In October 2009, the Agency discovered that Student H1 remained registered in error. On October 30, 2009, the Assistant Director sent an email to the Registrar asking that Student H1 be removed from the course roster. The Registrar had to take a retroactive action to accomplish the removal. The Agency considers retroactive actions to be significant amendments to its records and to be avoided whenever possible. Retroactive actions may result in audit points from Internal and External Auditors. The retroactive action remained a permanent part of Student H1's student record.

On September 1, 2009, Grievant registered Student B for the wrong class. She bypassed a Hold on the student's account. Once the error was identified, Grievant corrected the registration on November 6, 2009, by removing the incorrect registration and adding proper registration. The Agency had to take a retroactive action to correct the error. The Agency overcharged Student B as a result of the error.

Group I Written Notice

In his Conclusions of Policy, the hearing officer stated, in part, the following:

The evidence is insufficient to show that Grievant disregarded the Registrar's instruction in a manner to show a disregard of the Registrar's authority as a supervisor. The Group I Written Notice must be reversed.

Group II Written Notice

Regarding this disciplinary action, the hearing officer wrote the following:

In short, the Agency failed to provide Grievant with adequate notice that her behavior would result in disciplinary action. There is no basis to issue a Group II Written Notice of disciplinary action to Grievant. That Written Notice must be reversed.

Group III Written Notice

Concerning this disciplinary action, in his Conclusions of Policy the hearing officer wrote, in part, the following:

Grievant did not correctly register Student H2 within 24 hours of receiving a notice to do so. Grievant failed to remove properly Student H1 from classes. The consequences to Student H1 were that she was inappropriately registered for classes for which she should not have been registered. She had a Hold history that was inaccurate and a permanent part of her record. Her account could have been placed into Collections costing the Agency additional collections fees as well as lost revenue. Student H1's record reflects a retroactive action. Retroactive actions may result in audit points from Internal and external Auditors. The consequence to Student H2 was that she was not registered for her classes until August 25, 2009. The first day of classes was August 24, 2009. Because of the late registration, Student H2 was placed at risk of not being able to register for classes of her first choice.

Grievant did not correctly register Student B. The Agency overcharged Student B. Correcting the error resulted in a retroactive action. When an employee fails to comply with her Employee Work Profile, the employee has engaged in unsatisfactory work performance. Unsatisfactory work performance is usually a Group I offense. The question becomes whether the Agency can elevate a Group I offense to a higher level, and if so, whether a Group I offense can be elevated to a Group III offense.

DHRM Policy 1.60(B) (2) provides:

Note: Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms. Refer to Attachment A for specific guidance.

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This language suggests that in certain extreme circumstances, an Agency may elevate a Group I to a Group II offense and a Group II to a Group III offense. It does not appear to authorize an agency to elevate a Group I offense to a Group III offense. Accordingly, Grievant should receive a Group II Written Notice of disciplinary action.

Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Grievant had prior active disciplinary action consisting of a Group II Written Notice. With a second Group II Written Notice, the Agency's decision to remove Grievant from employment must be upheld.
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 Employment Dispute Resolution…." 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 Group II Written Notice.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded.** The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Grievant's removal is **upheld** based upon the accumulation of disciplinary action.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action exceeds reasonableness, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and/or procedure.

In the instant case, the grievant was issued a Group I Written Notice, a Group II Written Notice, and a Group III Written Notice with termination. In his decision, the hearing officer rescinded the Group I and Group II Written Notices. In addition, he reduced the Group III Written Notice to a Group II Written Notice level. The grievant remained terminated because she had other disciplinary action sufficient to keep her terminated.

CONCLUSION

The issue for this Department to review involves the permissible level of disciplinary action that can be assessed for unsatisfactory performance. This Department has consistently ruled that under "certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms."

This Department concurs with the decision of the hearing officer that, under certain circumstances, an agency may elevate a Group I Written Notice to a Group II Written Notice and a Group II Written Notice to a Group III Written Notice. Therefore, we have no basis to interfere with this part of the hearing decision.

Concerning the issue of mitigating circumstances, please note that based on the language in his decision, it appears that the hearing officer found no reasons to reduce further the disciplinary action. In addition, this Agency has no authority to assess the weight the hearing officer placed on mitigating circumstances.

Thus, this Department has no basis to interfere with the application of this hearing decision.

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Ernest G. Spratley