

Issues: Group II Written Notice (failure to follow policy), Group III Written Notice (failure to follow computer security policy), and Termination; Hearing Date: 06/28/12; Decision Issued: 07/11/12; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9813, 9837; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 07/26/12; EDR Ruling No. 2013-3394 issued 09/07/12; Outcome: Remanded to AHO; Remand Decision issued 10/23/12; Outcome: Original decision affirmed; Administrative Review; DHRM Ruling Request received 07/26/12; DHRM Ruling issued 11/14/12; Outcome: AHO's decision affirmed.**



# **COMMONWEALTH of VIRGINIA**

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

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

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

In re:

**Case Number: 9813 / 9837**

Hearing Date: June 28, 2012

Decision Issued: July 11, 2012

#### **PROCEDURAL HISTORY**

On January 30, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. On March 5, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for sharing her computer user account identification and password with two other employees.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On May 8, 2012, the EDR Director issued Ruling Numbers 2012-3343, 2012-3344 consolidating the two grievances for a single hearing. On May 15, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to the unavailability of a party. On June 28, 2012, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Advocate  
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:

Virginia Commonwealth University employed Grievant as a Business Manager. She had been employed by the Agency for approximately 20 years prior to her removal effective March 5, 2012. The purpose of Grievant's position was:

To serve as the business manager and chief financial officer for the department. Responsibilities include supervision and analytical review of all department accounts; supervision and training of all fiscal staff; budget forecasting; ensure proper and correct business practices are adhered to in all department financial transactions and ensure that management is appraised of all strengths and weaknesses in regard to the department's financial status. Serves as point person for all Recreational sports reporting functions and record keeping. Serves as lead administrative support staff for the Director and Associate Director.<sup>1</sup>

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<sup>1</sup> Agency Exhibit 5.

Grievant had not received prior active disciplinary action. Except with respect to the facts giving rise to this grievance, Grievant's work performance was satisfactory to the Agency.

Banner is an enterprise resource management computer system which includes the Agency's General ledger, Accounts Payable, and student information. The Agency provides employees with a unique user account and password. Some employees are granted permission to use more functions within the Banner system than other employees depending upon their work duties. Grievant's two subordinates did not have the same level of permission as Grievant had to access features of the Banner system.

The Department Director noticed irregularities regarding employee use of credit cards. The Department Director contacted the Auditor for an investigation. The Auditor investigated the potential misuse of credit card processing within the department. The Auditor noted issues with the journal voucher processing within the department. The audit concluded:

While reviewing the journal vouchers for credit card refund transactions, we notice that the refunds did not include any signed receipt documentation. We also noted that the dollar value of the transactions was significantly higher than the dollar value of normal credit transactions. [Grievant] stated that she receives the journal vouchers for the [Agency divisions] at the end of each month to review. This results in over 100 journal vouchers to review at the end of each month since vouchers are generally created each day to summarize the activity for that day. [Grievant] also stated that due to the large body of a journal vouchers and the lack of time, she does not review the journal vouchers in detail.

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We noted the following issues with the journal voucher documentation:

- Voucher documentation does not agree to the journal voucher dollar amount;
- Voucher documentation did not include original receipt;
- There was never reconciliation of the supporting documentation to the journal voucher entry; and
- [Grievant] did not agree the documentation for the journal voucher to the documentation prior to approval of the transaction.

The department's lack of adherence to university policy has allowed inappropriate processing of refunds and other transactions to be processed without appropriate supporting documentation. This has caused a loss in excess of \$4000 to the department.<sup>2</sup>

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<sup>2</sup> Agency Exhibit 3.

From May 2011 through December 2011, Grievant was assigned additional duties. She was given responsibility to serve as a Personnel Assistant for another department within the Agency. She retained responsibility to perform her existing duties as well as performing the additional duties. In order to complete all of her existing duties, she believed it was necessary to give to her password to the Banner system to her two subordinates. The two subordinates used Grievant's password on two occasions to access Banner and enter information into the Agency's computer systems.

## **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>3</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

### Group II Written Notice

Failure to follow policy is a Group II offense.<sup>4</sup> The Agency has established that Grievant failed to comply with Agency policy as expressed in the report of the Auditor. For example, Grievant approved financial transactions without reviewing the supporting documentation.

### Group III Written Notice

The Agency's Computer and Network Resources Use Policy 3409 governs employees using the Agency's computer and network resources. This policy provides:

Access to computer and network resources is restricted to authorized individuals as defined by the appropriate organizational unit. Accounts and passwords, when required, are assigned to specific individuals and may not, unless properly authorized by the University, be shared with, or used by, other persons within or outside the University.

Grievant violated this policy because on two occasions she shared her account and password with two other employees. Those employees entered the Agency's computer systems using Grievant's account. The subordinates had access to features of the

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<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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

Banner system that they would not otherwise have been able to access. The Agency lacked the ability to identify the transaction completed by the subordinates.

Failure to comply with a policy typically is a Group II offense. Attachment A to DHRM Policy 1.60 provides, “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.” In this case, there exists a basis to elevate the disciplinary action to a Group III offense. By providing her password to two employees, Grievant undermined the security of the Agency’s computer system and undermined the Agency’s system of “checks and balances” with respect to expenditures by those two employees. For example, Grievant was responsible for approving several financial transactions performed by the two employees. The employees could use Grievant’s account information to enter the computer system, create financial transactions that benefited them and then approve the transactions under Grievant’s name without anyone knowing their actions.

Grievant argued that the impact on the Agency was not significant because the individuals with whom she shared her password were her subordinates and were performing Agency work. This argument fails. The Agency’s policy specifically prohibits sharing passwords with “persons within ... the University.” The policy establishes the same standard for persons within the University as for persons outside of the University. In addition, after providing employees with her password, Grievant failed to change the password even though the employees no longer needed access to perform duties on Grievant’s behalf.

### Mitigation

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....”<sup>5</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because on May 13, 2011, Grievant was given responsibility to serve as the Human Resource administrator for another Agency department. That department was recognized as

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<sup>5</sup> Va. Code § 2.2-3005.

being one of the largest departments of employment for faculty staff and student employees at VCU. Grievant perform the duties of a full-time Personnel Assistant at the second department until December 2011.

There are both mitigating and aggravating circumstances in this case. Mitigating circumstances include that Grievant was given additional duties by the Agency in another department that distracted her from her regular duties. She was unable to fully focus on her regular duties because she was obligated to devote significant time to providing support to the other department. For example, on some days Grievant spent five hours performing duties for the second department and only three hours performing her existing duties. Aggravating circumstances include that Grievant was authorized to be paid for overtime work and could have worked as many hours as necessary to perform both jobs. She only worked approximately two hours of overtime per week. Had she worked additional hours of overtime, she may have been able to perform fully the duties of her existing position.

When the mitigating and aggravating circumstances are considered as a whole, there exists a basis to reduce the Group II Written Notice to a Group I Written Notice. There does not exist a basis to reduce the Group III Written Notice given the severity of Grievant's behavior. Although the Agency might have expected that Grievant would have difficulty performing the duties of two positions, there is no reason for the Agency to have foreseen that Grievant may have attempted to reduce her burden by giving two subordinates her password to the Agency's computer system. Grievant's behavior undermined the Agency's General ledger, Accounts Payable, and student information computer system.

## 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 **reduced** to a Group I Written Notice. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for sharing her network password 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 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. 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 email.

3. 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 email 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 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.<sup>6</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>6</sup> 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: 9813 / 9837-R**

Reconsideration Decision Issued: October 23, 2012

**RECONSIDERATION DECISION**

On September 7, 2012, the Office of Employment Dispute Resolution issued Ruling 2013-3394 stating:

The grievant argues that she did not know at the time that sharing her password with subordinate employees was a violation of policy.

Section VI(B)(1) of the *Rules* includes "lack of notice" as an example of mitigating circumstances. Significantly, the *Rules* do not provide that each time there is a lack of notice the imposed discipline automatically "exceeds the limits of reasonableness." Even if the hearing officer finds that an employee lacked notice of the disciplinary consequences of breaking a rule, the hearing officer must still consider all facts and circumstances, including the lack of notice as a mitigating circumstance, to determine whether the imposed discipline "exceeds the limits of reasonableness."

Accordingly, the *Rules'* notice provision is not intended to require or permit a hearing officer to mitigate discipline simply on the basis that an agency had failed to provide the employee with prior notice that a particular offense could result in the specific discipline imposed, or indeed, with prior notice of the *Standards of Conduct* (although the latter would be a good management practice). The *Rules* provision on notice does not require that exact consequences be spelled out in advance; rather, this provision must be read to include an objective "reasonableness" standard. This provision is intended to require actual or constructive notice of the consequences for misconduct only in cases where the severity of the discipline imposed could not have been anticipated by a reasonable employee.

Thus, consistent with the *Rules* provision quoted above, notice of the possible consequences may not even be required if a reasonable, objective employee should have anticipated the severity of the discipline in light of the founded misconduct. And even if the “reasonable, objective” employee would not have anticipated the severity of the discipline, he or she could still have actual or constructive notice of the possible consequences of breaking a rule. An employee would have notice if, for example, the possible consequences “had been distributed or made available to the employee” or had been “communicated by word of mouth or by past practice.”

A hearing officer must consider all relevant factors relating to notice raised by the grievant and raised by the agency in determining whether a lack of notice exists. If the hearing officer so finds, he is to further consider whether due to the lack of notice, and in light of all other surrounding facts and circumstances, the agency’s discipline exceeds the limits of reasonableness and should be mitigated. Though the issue of whether or not the grievant knew that sharing her password with her subordinate employees was against University policy was addressed in testimony at hearing and within University’s exhibits, the hearing decision makes no findings of fact on this subject or assesses whether it has any effect on the outcome of the case. Accordingly, the hearing decision must be remanded for an explanation and/or reconsideration of the issue of notice and the mitigation standard, consistent with this Ruling.

For the reasons set forth above, the hearing officer must reconsider the issue of whether the grievant was aware that the behavior for which she was terminated was in violation of University policy and to what extent, if any, the outcome of this case may be affected by such a finding.

Grievant had adequate notice of her obligation under policy to refrain from sharing her password with another employee. Agency Policy 3409 was distributed on the Agency’s computer network. The Agency’s Policy 3409 is consistent with DHRM Policy 1.75 which provides that users should:

Exercise the appropriate care to protect the agency’s electronic communications tools against the introduction of viruses, spyware, malware, or other harmful attacks. When using the Commonwealth’s electronic communications tools, social media or Internet access, employees must:

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Maintain the conditions of security (**including safeguarding of passwords**) under which they are granted access to such media; (Emphasis added).

Grievant's 2009 Employee Work Profile (EWP) states:

I agree that I will not:

Disclose to any other person who does not have a business "need to know," or to allow any other person access to, any information related to VCU that is proprietary or confidential. Disclosure of information includes, but is not limited to, verbal discussions, VAX transmissions, electronic mail messages, voice mail communication, written documentation, "**loaning**" **computer access codes**, and/or any other transmission or sharing of data. (Emphasis added).

Grievant violated the Agency's policy and DHRM Policy prohibiting disclosure of passwords. Grievant had adequate notice that violation of policy is a Group II offense under DHRM Policy 1.60 because that policy is widely distributed and available on the DHRM website. DHRM Policy 1.60 provides that Group II offenses can be elevated to Group III offenses. Grievant first received notice of the Standards of Conduct in 1992 when she received a copy of the policy as part of her New Employee Orientation.<sup>7</sup> There is no basis to mitigate the disciplinary action against Grievant for lack of notice.

### 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 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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> See, Agency Exhibit 6. As part of her orientation, Grievant received a copy of the Agency's Computer Ethics policy. Grievant's receipt of this policy should have identified for her that the Agency intended to regulate employees' use of computers.

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of  
Virginia Commonwealth University

November 14, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9813/9837. For the reasons stated below, the Department of Human Resource Management (DHRM) will not interfere with the application of this decision. The agency head of DHRM, Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The Hearing Officer entered the summary of this case as follows:

On January 30, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. On March 5, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for sharing her computer user account identification and password with two other employees.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On May 8, 2012, the EDR Director issued Ruling Numbers 2012-3343, 2012-3344 consolidating the two grievances for a single hearing. On May 15, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to the unavailability of a party. On June 28, 2012, a hearing was held at the Agency's office.

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The relevant facts of this case are as follows:

Virginia Commonwealth University employed Grievant as a Business Manager. She had been employed by the Agency for approximately 20 years prior to her removal effective March 5, 2012. The purpose of Grievant's position was:

To serve as the business manager and chief financial officer for the department. Responsibilities include supervision and analytical review of all department accounts; supervision and training of all fiscal staff; budget forecasting; ensure proper and correct business practices are adhered to in all department financial transactions and ensure that management is appraised of all strengths and weaknesses in regard to the department's financial status. Serves as point person for all Recreational sports reporting functions and record keeping. Serves as lead administrative support staff for the Director and Associate Director.

Grievant had not received prior active disciplinary action. Except with respect to the facts giving rise to this grievance, Grievant's work performance was satisfactory

to the Agency.

Banner is an enterprise resource management computer system which includes the Agency's General ledger, Accounts Payable, and student information. The Agency provides employees with a unique user account and password. Some employees are granted permission to use more functions within the Banner system than other employees depending upon their work duties. Grievant's two subordinates did not have the same level of permission as Grievant had to access features of the Banner system.

The Department Director noticed irregularities regarding employee use of credit cards. The Department Director contacted the Auditor for an investigation. The Auditor investigated the potential misuse of credit card processing within the department. The Auditor noted issues with the journal voucher processing within the department. The audit concluded:

While reviewing the journal vouchers for credit card refund transactions, we notice that the refunds did not include any signed receipt documentation. We also noted that the dollar value of the transactions was significantly higher than the dollar value of normal credit transactions. [Grievant] stated that she receives the journal vouchers for the [Agency divisions] at the end of each month to review. This results in over 100 journal vouchers to review at the end of each month since vouchers are generally created each day to summarize the activity for that day. [Grievant] also stated that due to the large body of a journal vouchers and the lack of time, she does not review the journal vouchers in detail.

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We noted the following issues with the journal voucher documentation:

- Voucher documentation does not agree to the journal voucher dollar amount;
- Voucher documentation did not include original receipt;
- There was never reconciliation of the supporting documentation to the journal voucher entry; and
- [Grievant] did not agree the documentation for the journal voucher to the documentation prior to approval of the transaction.

The department's lack of adherence to university policy has allowed inappropriate processing of refunds and other transactions to be processed without appropriate supporting documentation. This has caused a loss in excess of \$4000 to the department.

From May 2011 through December 2011, Grievant was assigned additional duties. She was given responsibility to serve as a Personnel Assistant for another department within the Agency. She retained responsibility to perform her existing

duties as well as performing the additional duties. In order to complete all of her existing duties, she believed it was necessary to give to her password to the Banner system to her two subordinates. The two subordinates used Grievant's password on two occasions to access Banner and enter information into the Agency's computer systems.

The hearing officer concluded the following:

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." 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 II Written Notice

Failure to follow policy is a Group II offense. The Agency has established that Grievant failed to comply with Agency policy as expressed in the report of the Auditor. For example, Grievant approved financial transactions without reviewing the supporting documentation.

#### Group III Written Notice

The Agency's Computer and Network Resources Use Policy 3409 governs employees using the Agency's computer and network resources. This policy provides:

Access to computer and network resources is restricted to authorized individuals as defined by the appropriate organizational unit. Accounts and passwords, when required, are assigned to specific individuals and may not, unless properly authorized by the University, be shared with, or used by, other persons within or outside the University.

Grievant violated this policy because on two occasions she shared her account and password with two other employees. Those employees entered the Agency's computer systems using Grievant's account. The subordinates had access to features of the Banner system that they would not otherwise have been able to access. The Agency lacked the ability to identify the transaction completed by the subordinates.

Failure to comply with a policy typically is a Group II offense. Attachment A to DHRM Policy 1.60 provides, "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." In this case, there exists a basis to elevate the disciplinary action to a Group III offense. By providing her password to two employees, Grievant undermined the security of the Agency's computer system and undermined the Agency's system of "checks and balances" with respect to expenditures by those two employees. For example, Grievant was responsible for approving several financial transactions performed by the two employees. The employees could use Grievant's account information to enter the

computer system, create financial transactions that benefited them and then approve the transactions under Grievant's name without anyone knowing their actions.

Grievant argued that the impact on the Agency was not significant because the individuals with whom she shared her password were her subordinates and were performing Agency work. This argument fails. The Agency's policy specifically prohibits sharing passwords with "persons within ... the University." The policy establishes the same standard for persons within the University as for persons outside of the University. In addition, after providing employees with her password, Grievant failed to change the password even though the employees no longer needed access to perform duties on Grievant's behalf.

### Mitigation

*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 nonexclusive 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 contends the disciplinary action should be mitigated because on May 13, 2011, Grievant was given responsibility to serve as the Human Resource administrator for another Agency department. That department was recognized as being one of the largest departments of employment for faculty staff and student employees at VCU. Grievant perform the duties of a full-time Personnel Assistant at the second department until December 2011.

There are both mitigating and aggravating circumstances in this case. Mitigating circumstances include that Grievant was given additional duties by the Agency in another department that distracted her from her regular duties. She was unable to fully focus on her regular duties because she was obligated to devote significant time to providing support to the other department. For example, on some days Grievant spent five hours performing duties for the second department and only three hours performing her existing duties. Aggravating circumstances include that Grievant was authorized to be paid for overtime work and could have worked as many hours as necessary to perform both jobs. She only worked approximately two hours of overtime per week. Had she worked additional hours of overtime, she may have been able to perform fully the duties of her existing position.

When the mitigating and aggravating circumstances are considered as a whole, there exists a basis to reduce the Group II Written Notice to a Group I Written Notice.

There does not exist a basis to reduce the Group III Written Notice given the severity of Grievant's behavior. Although the Agency might have expected that Grievant would have difficulty performing the duties of two positions, there is no reason for the Agency to have foreseen that Grievant may have attempted to reduce her burden by giving two subordinates her password to the Agency's computer system. Grievant's behavior undermined the Agency's General ledger, Accounts Payable, and student information computer system.

The hearing officer made the following 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 reduced to a Group I Written Notice. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for sharing her network password **is upheld.**

### **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. By statute, as related to policy, 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 regarding policy issues, 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 procedure.

In her appeal to DHRM, the grievant contends that the Group III Written Notice should not have been elevated to that level. She contends further that if the grievant was issued discipline, the Associate Director should also be issued discipline. Her argument fails for the following reasons.

DHRM Policy No. 1.60 states, "It is the policy of the Commonwealth to promote the well-being of its employees by maintaining high standards of work performance and professional conduct." It states as its purpose, "The purpose of this policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness."

In the instant case, the evidence as revealed at the hearing supports that the grievant failed to comply with agency policy as expressed in the auditor's report. As enumerated in the above in this document, the grievant approved financial transactions without reviewing the supporting documentation. Failure to follow policy or instructions is a Group II offense for which the agency issued a Group II Written Notice. The DHRM does not disagree with this level of discipline.



In addition, the agency issued to the grievant a Group III Written Notice with termination for violating the Agency's Computer and Network Resources Use Policy 3409. This policy summarily states that employees must use their assigned passwords and may not, unless properly authorized by the University, share or use passwords belonging to other individuals, either within or outside the University. The grievant permitted two of her subordinates to use her password and the University issued to her a disciplinary action. Because the violation was a potentially serious breach of security, the agency elevated the discipline to the Group III level. Under the Standards of Conduct, the agency had that option. Thus, DHRM will not interfere with this disciplinary action.

Finally, the grievant contends that the Associate Director should also be issued some form of disciplinary action. In a ruling dated September 7, 2012 (Ruling No. 2013-3394), the EDR stated, in part, the following:

The grievant argues that the University did not apply disciplinary action to her consistent with other similarly situated employees. A review of the hearing record indicates that the grievant did not raise the issue of potentially inconsistent discipline at the hearing. Therefore, the grievant's evidence of inconsistent discipline can only be considered if it is "newly discovered evidence" 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. The party claiming evidence was "newly discovered" must show that

- (1) The evidence was newly discovered since the judgment was entered;
- (2) due to diligence...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 it is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.

Here, the grievant has provided no information to support a contention that the additional records should be considered newly discovered under this standard. The grievant had the opportunity at the hearing to submit this evidence in support of her position and did not do so. Consequently, there is no basis to re-open or remand the hearing for consideration of this additional evidence.

Based on the above, DHRM has no basis to interfere with the application of this decision. With the combination of a Group I Written Notice and a Group III Written Notice, it was permissible to terminate the grievant.

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Ernest G. Spratley  
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