

Issues: Discrimination (race and age), Retaliation (other protected right), and Separation from State (layoff); Hearing Date: 03/24/15; Decision Issued: 08/14/15; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10490; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 08/28/15; EDR Ruling No. 2016-4221 issued 10/06/15; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 08/28/15; DHRM Ruling issued 10/27/15; 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: 10490

Hearing Date: March 24, 2015
Decision Issued: August 14, 2015

PROCEDURAL HISTORY

On August 4, 2014, Grievant was informed her position was being abolished and she would be removed from employment effective September 15, 2014 due to layoff. On August 8, 2014, 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 November 10, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The matter was scheduled for hearing but continued until March 13, 2015. Evidence was presented to the Hearing Officer on March 13, 2015 and then on March 24, 2015.

APPEARANCES

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

ISSUES

1. Whether Grievant was removed from employment due to her race or age?¹
2. Whether the Agency retaliated against Grievant?

BURDEN OF PROOF

The burden of proof is on Grievant to show that the relief she seeks should be granted. 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 presented² and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Community College System employed Grievant as a Financial Aid Supervisor at one of its Colleges. The purpose of her position was to “manage the College’s financial aid office and to administer financial aid programs to qualified students.”³ Grievant was responsible for overseeing the Financial Aid Office. She was expected to know the Federal Regulations governing Financial Aid and know how to implement them at the College. Grievant was expected to be the most knowledgeable person at the College regarding Financial Aid. Grievant’s position did not require a bachelor’s degree. She was qualified for her position when her Employee Work Profile was written.

Grievant had been employed by the College since August 1, 1977. Grievant received an overall rating of Contributor on her October 2013 annual performance evaluation. Grievant is African-American.

Grievant supervised at least two full time and three part-time employees. Grievant reported to the Dean of Students. The Dean of Students supervised several units and relied on Grievant to supervise the Financial Aid unit. The Dean of Students reported to the Vice President. The Vice President reported to the President. The President reported to the Chancellor.

¹ The Agency’s decision was not disciplinary in nature. The Agency’s change was not intended to punish Grievant but rather to secure the program to ensure compliance with Federal regulations and fiscal responsibility.

² Some of the Grievant’s Exhibits contained portions that were not readable. The Hearing Officer did not consider any portion of an exhibit that was not legible.

³ Grievant Exhibit 47.

The College participated in the Federal Student Aid program. To participate in the Federal Student Aid program, the College had to “demonstrate that it was administratively capable of providing the education it promises and of properly managing the FSA programs.”⁴ If Grievant improperly managed the Financial Aid program at the College, she could jeopardize Title IV Federal Funding. The U.S. Department of Education periodically conducts audits to determine whether the Agency has complied with Federal regulations.

The College relied on Federal Financial Aid to ensure that many of its students had sufficient funds to pay tuition and attend the College. The President considered a properly administered Financial Aid Unit to be crucial to the College’s operations.

Grievant worked closely with the Admissions and Records Unit. This Unit was supervised by a temporary employee, Ms. F. Ms. L formerly supervised the Admissions and Records Unit until she was removed from employment. Ms. L is white.

In 2011, the President contacted the Director of Financial Aid to discuss financial aid. The President expressed concern about whether the College’s financial aid department was functioning properly. He was concerned about customer service and administration of the Title IV program at the College. He asked for recommendations from the Director of Financial Aid. He mentioned possibly upgrading Grievant’s position to an administrative faculty position. The Director of Financial Aid suggested elevating Grievant’s position with Grievant remaining in the position or creating a new position supervising Grievant’s position. The Director of Financial Aid agreed that the position could be upgraded because the College was one of only three colleges out of twenty colleges that had their financial aid programs administered by a position without the requirement of a bachelor’s degree or higher.

The Agency is audited by the Auditor of Public Accounts. The Agency has an Internal Audit department. The Internal Audit Department Director reports to a State Board for Community Colleges rather than the Agency’s Chancellor with respect to internal audits of the Agency.

The Auditor of Public Accounts chooses several but not all of the Agency’s colleges to audit every year. Over a three year period, all of the Colleges are audited at least once by the APA.

During an exit interview, a former employee made several allegations regarding how Grievant was administering the Financial Aid Unit. Among other things, the former employee alleged Grievant was approving financial aid to students without verifying their eligibility.

⁴ Agency Exhibit 19.

Based on the former employee's allegations, the President decided to ask the Agency's Internal Audit division to conduct an internal audit of the College's handling of Financial Aid. The Internal Audit Director told the President her office was in the process of conducting a comprehensive financial aid internal audit at the College and she would incorporate addressing the allegations into the internal audit.

The Agency conducted an Internal Audit "to determine whether colleges are adequately administering the post award process, college departments are coordinating effectively to administer post award processes, and whether Financial Aid departments' policies are current and comply with regulations."⁵ Seven colleges were audited. The period of review was from July 1, 2013 through June 30, 2014. The Internal Audit of the College began on April 25, 2014.

On May 22, 2014 at 2:14 p.m., the Acting Director of Internal Audit sent the Dean of Students, Vice President, and Mr. P an email stating:

As I mentioned to [name] yesterday, I'm going to be sending the draft management points out to all of you, plus [Grievant] by close of business today. We did meet with [Grievant] when we visited you all, and went over the facts which we used to write up these points, but she will not have seen the actual points until you all get this email this afternoon. The points were "**very**" serious, and I expect she will not be happy with them, but she had a chance to dispute the facts and was unable to do so.⁶

On May 22, 2014 at 2:49 p.m., the Acting Director of Internal Audit sent an email to the Dean of Students, Vice President, Mr. P, and Grievant an email stating:

I have attached the draft of the management points report from our recent audit of the Financial Aid Post Award Process at [the College]. Please review the points and prepare a response for each point indicating the planned response action, the position responsible for completing the action, and the date by which that action is to take place. Please keep in mind that the plans must mitigate the risks revealed by the audit in a timely fashion; shortly after each plan is to be completed we will follow up to determine compliance. Please complete your response by Thursday June 12.

[Internal Auditor] and I met with [Grievant] before we left [the College] on May 8th; we are in agreement on the facts behind each point in the report.⁷

⁵ Agency Exhibit 1.

⁶ Grievant Exhibit 12.

⁷ Grievant Exhibit 11.

When the Vice President reviewed the Internal Audit findings, he was surprised by the number and magnitude of the errors for which Grievant was responsible. The Dean of Students was also surprised by the findings. The President was “stunned” by the findings and had no reason to doubt the audit’s findings.

On May 27, 2014, Grievant sent an email to the Dean of Students, Vice President, and President stating, “[p]lease review the attached before I submit. My responses are in red.”⁸

The introduction to the Internal Audit Report began, “The Financial Aid post award process at [the College] has significant deficiencies and internal control weaknesses. ***

Grievant responded:

I would like to state that the [College] Financial Aid Office has been audited each year for the last seven years. With my 38 years of experience in financial aid, I am very familiar with the Key Federal policies to financial aid and this office has never been found in significant non-compliance with federal and awarding federal aid to ineligible students. The APA auditors have found [the College] in compliance with self-reporting requirements and no non-compliance issues by the Auditors in 2013.

Issue 1 of the Report addressed Students Authorized and Disbursed Without Verification. The Report stated:

[the College] overrode controls intended to prevent the disbursing of aid to students who should have been verified in accordance with Department of Education (ED) regulations. Authorization and disbursement of aid to students chosen by ED for verification but not verified puts the College at risk. If the student misrepresented income or other information which should have been verified, the College is liable for the return of those funds to ED and the Commonwealth of Virginia (COV), without recourse to the student. *** During our review 22 students were authorized and disbursed federal and state aid for a total of \$51,136.72 without being verified. ***

Grievant responded:

Please provide me with the names and id’s of the students that were disbursed without being verified. I still do not recall any verifications without documents. If a student goes in to their FAFSA and uses the IRS Data Retrieval, Verification is not required. We have checked the

⁸ Grievant Exhibit 14.

Verification box on the Packaging Status page to make sure this will not happen in the future. Also, to expedite cases the Financial Aid Director is allowed to perform verifications. If not, please cite federal regulations that prevent this.

Issue 2 of the Report addressed Authorization and Disbursement Process Not Accurately or Consistently Performed. The Report stated:

[The College] does not perform the authorization and disbursement process during post-award activities thoroughly, accurately, or consistently. These errors result in incorrect awards which can impact student admission, retention and success, as well as [the College's] non-compliance with ED and COV regulations.

Internal Audit determined that 5 of 9 students tested (55.5%) were re-packaged either incorrectly or late, over awarded, not processed for funds requiring return to ED (turn to Title IV, or R2T4), or had incorrect amounts for R2T4 calculation. These inaccuracies affect amounts awarded and disbursed to the students, as well as funds returned to ED, both of which violate federal regulations. ***

Through discussion with [Grievant], it was evidence that she does not understand the purpose of the authorization rules in PeopleSoft. The authorization only checks for authorizations against the rules set, and does not verify the amount awarded, which is accomplished prior to authorization for disbursement through the re-packaging process. The fundamental misunderstanding enabled the rules to be set incorrectly, as [Grievant] incorrectly thought that the award was verified through the authorization process.

Grievant responded:

[The College] runs queries to determine student's overpayment. Overawards only occur if a student has been paid and refunded for course they never attended. The Enrollment mismatch report is run consistently up to each census data including the modules. Student's credits are adjusted to take into account non-attendance in courses. Title IV Calculations, based on APA directions are done once a week up to the 60% of the semester. We have been informed by APA that this is what was needed to [be] done. ***

The Report stated:

[The College] procedures consistently result in overpayments of aid to students, which leaves [the College] out of compliance with federal regulations. This also requires significant rework by the Financial Aid

staff, and repayment to ED by CVCC, whether or not students have repaid [the College]. *** A primary reason for these overpayments is [the College's] failure to use census dates or a re-packaging process for late-starting classes with later census dates. ***

Grievant responded:

[The College] does not have a systemic overpayment of awards. [The College] follows the guidelines established by the Federal Government and have been reviewed by APA auditors. The overpayments as stated previously are due to students never attending classes and have bookstore charges or did not enroll in later starting classes. We will be addressing this to hold funds for later starting classes for those identified students. This still will not address the issue of overpayments as some of these students will have reduced awards that will need to be repair if they do not attend the later starting classes.

Issue 4 of the Report addressed Late Commonwealth Grant Disbursement. The Report stated:

We determined that approximately \$300,000 of Commonwealth Grant awards (COMA) were awarded during April 2014 for Fall, 2013 and Spring, 2014. Awarding disbursed aid at the end of the year in order to “use up” the funds results in Summer term students not receiving assistance for which they were qualified. This can result in students failing to enroll for financial reasons. Financial Aid should be supporting student success; by failing to provide aid for summer school students Financial Aid is failing to support enrollment and student success. *** The current practice may negatively impact summer enrollment.

Grievant responded:

This is not a non-compliance issue. [The College] awards 150% of all state awards beginning in May for the preceding year. When all funds are used, all other students that have applied after the funds are used are placed on a waiting list. ***

Issue 5 of the Report addressed Federal Student and Processes Not Performed Correctly. The Report stated:

[The College] manually processed the Federal Student Aid database with PeopleSoft in Spring, 2014, rather than use the automated process which both ED and best practices recommend. This resulted in several negative consequences, including a significant and unnecessary expenditure of staff time, a higher than necessary risk of keying mistakes, and causing

817 students to be “stuck” in the database in a way which will require manual awarding of summer aid to them. ***

Grievant responded:

This was the first time this had happened. *** These rights were taken away from the Financial Aid Office by the IT Department and staff assisted in setting up the database. The database was set up to run to the non-shared database of a former employee which prevented the file from being loaded properly. If other years are reviewed, you will see that this has been done appropriately and correctly each year before this. I am in the process of reviewing all of the office’s computers to ensure that this is set up correctly in the future. ***

Issue 6 of the Report addressed Incorrect Reconciliations With Federal Student System. The Report stated:

The information for Financial Aid Professionals (IFAP) website states that the Department of Education requires that COD is reviewed and compared with a school’s internal records on a monthly basis. Making changes directly to COD is highly discouraged, and goes against VCCS best practices, as it circumvents PeopleSoft and makes Pell and Direct Loan originations/disbursements out of sync. Furthermore, data entry records could be made in COD affecting student records or student awards, which would then not be captured in PeopleSoft.

During at least one instance, [the College] Financial Aid notes discrepancies between COD and PeopleSoft and directly made changes to the COD so that it reflected that PeopleSoft amounts. There was no attempt to perform an actual reconciliation or identify the discrepancies to correct.

Grievant responded:

I have not found any federal regulation that states that changes cannot be made in COD. We realize that this is highly discouraged, there are times this is the only way to correct a record after verifying the amount in PeopleSoft.

Issue 8 of the Report addressed Process of Returning Federal Aid Not Performed Consistently or Timely. The Report stated:

To comply with Return to Title IV (R2T4), Federal regulations require that Financial Aid office apply a formula to determine the amount of federal financial aid a student has earned as of his/her withdrawal date or last date of attendance; anything unearned must be returned to the federal

government. [The College] Financial Aid is only performing the procedure to determine what aid is owed back to ED once per semester; the procedure must be performed at the 60% mark of all terms, including late-starting one. This can result in students not being informed timely of aid to be refunded, could obligate [the College] to refund the aid of students who do not reimburse [the College], and can result in aid not being refunded to ED, which could subject the College to penalties if this situation were discovered during an ED audit. ***

Grievant responded:

Based on all previous audits conducted by APA, [the College] is following the federal rules and are in compliance with the R2T4 regulations. *** This process is consistent and done in a timely manner based on what previous auditors have informed us to do.

Issue 9 addressed Training and Customer Service Not Emphasized. The Report stated:

Continuous training of Financial Aid staff and providing customer service to financial aid students are not emphasized. In discussions with Financial Aid staff and [Grievant] we learned that emails and information related to financial aid regulation updates and best practices are not forwarded to the staff. The [College's] Financial Aid policies and procedures documents, which staff should be able to use to ensure compliance and good practices, has not been updated in the last 5 years. ***

Grievant replied:

Continuous training of Financial Aid Staff in providing Customer Service to financial aid is emphasized on a daily basis. In addition, the college provided mandatory training for all employees last spring that included the financial aid staff. *** The internal auditor was avid that the Financial Aid Policy and Procedure manual was in the process of being updated due to the many changes federal and within PeopleSoft. Due to the staffing levels and schedules of employees in the Financial Aid Office mandatory meetings are not feasible to be held. ***

Issue 10 of the Report addressed Academic Dates Not Set Collaboratively. The Report stated:

Dates that impact financial aid, including the academic calendar, are not set collaboratively. ***

Grievant replied:

At the beginning of each year, the Dean of Student Services, Financial Aid Director and Admissions Director meet to set the academic calendar up for the next year. ***⁹

Under the Agency's Internal Audit process, the Agency's Internal Auditors expected a response from the College outlining how the College intended to fix the problems identified in the Internal Audit. Grievant's response focused on her disagreement with the audit findings rather than how to correct the problem. After reviewing the Internal Audit Findings and Grievant's response, the President "lost confidence" in Grievant's ability to correct the audit findings and manage the Financial Aid Unit. The President did not doubt the validity of the Internal Audit but was concerned by Grievant's refusal to acknowledge their validity. He perceived Grievant's response as disputing all of the audit findings and asserting that the Internal Audit was not credible.

On June 2, 2014, the President sent the Acting Director of Internal Audit an email stating:

I am forwarding [Grievant's] analysis of the financial aid report to you because I am, frankly, at a loss. This is [Grievant's] reaction to the draft, not [the College's] official response.

I am at a loss because, as you will see, [Grievant] has denied or refuted virtually every finding. I realize that does not follow the usual protocol. However, because we lack a detailed knowledge of financial aid policies, [Grievant's] judgment represents our sole internal source of information, as we do not have the expertise to respond in any other way to the findings.

Perhaps this is a human resource issue more than anything else, but I am still wondering if you have any counsel on how we might process from an audit perspective.¹⁰

On June 6, 2014, the Vice President, Dean of Students, Mr. P, and Grievant met with the Agency's Acting Director and Internal Auditor for an exit conference. The College responded to each audit point and concluded, "[m]anagement agrees with the findings and will develop Action Plans and timelines that are realistic and feasible."¹¹

On June 23, 2014, the Acting Director of Internal Audit sent the Vice President an email stating:

⁹ Grievant Exhibit 14.

¹⁰ Grievant Exhibit 18.

¹¹ Agency Exhibit 8.

Our recommendations deliberately went beyond simply recommending the problems we found be fixed. That is, when the finding was that the R2T4 program wasn't being run as it should be, we didn't recommend merely running the process appropriately, but "developing a robust understanding of the reports and controls which should be in place." Because we found so many things wrong, the problem is much bigger than fixing each of the individual problems we found.

When [Internal Auditor] and I talked to [Grievant] – and during the exit conference that you attended, [Grievant] fairly consistently explained that she didn't understand the processes, controls, and regulations. Specifically, to the example above, it wasn't that she forgot to do the R2T4, it was that she genuinely didn't know that she had to run it throughout the semester. She said that the APA auditors told her she didn't have to, but – even beyond the fact that she shouldn't be looking to the APA to teach her how to do her job – it was clear that she didn't have an understanding of the purpose of the process, or she would have understood that it was necessary to run it throughout the semester, whether the APA thought so or not. Our discussions for the other points were much the same: Not a question of forgetting, but of not understanding how things should be done, or why.

We would like to see, in your Management Action Plans, how you all intend to correct the larger problem that the Financial Aid Office doesn't have a robust understanding of the controls, processes, and regulations related to federal aid.¹²

On June 30, 2014, the Vice President sent the Internal Auditor an email asking to schedule a conference call because "I want to make sure I understand what is meant by a robust understanding and how best to address and document what is needed for the issues in my area."¹³

On June 30, 2014, the President sent the HR Manager an email stating:

On another topic, where do we stand on a determination of possible personnel actions on [Grievant]? Because the issues are so serious – and the consequences for students and the college so grave – I believe we need to resolve the situation as expeditiously as possible. ***¹⁴

On July 1, 2014, the HR Manager sent the President an email stating:

¹² Grievant Exhibit 287.

¹³ Grievant Exhibit 28.

¹⁴ Grievant Exhibit 30.

I have reviewed the materials that were submitted to me regarding the financial aid office. I also pulled down the 2012 APA audit results from its site to understand the full scale of the issues. After consideration, I believe you have 2 viable options:

1. Provide a Standard of Conduct group II written notice and a 10-day suspension, or
2. Create a business case for reorganization to support a creation of an administrative position that would supervise both the Admissions and Records office and Financial Aid office. This would then necessitate the abolishment of the current financial aid coordinator position held by [Grievant]. [Grievant] would then be laid off and receive severance benefits.

Termination would not be advisable despite the continued performance issues due to the fact that [Grievant] was not provided a Standards of Conduct warning for the 2012 audit issues and because her performance evaluations do not address any of these issues in them. I believe she would grieve and win.

I have discussed this with [another person] and he agrees with my assessment that the best option for [the College] to consider is the reorganization due to the problems with both departments (A&R and FA) and how closely they work together to assist students in entering and persisting with the College. This may be a great opportunity to look at these operations overall to ensure you have the appropriate level and skill sets within these areas. ***

Therefore, if you should decide to establish the administrative faculty position, I would need a business case (approximately 2 pages) to substantiate the reasons for it that I can submit for approval through [Ms. V] and the Chancellor. I have attached a start of a draft to help highlight some of the salient areas that would need to be addressed.¹⁵

On July 2, 2014, the President replied to the HR Manager:

Your recommendation concerning reorganization reflects one of the alternatives we have contemplated internally. One of the original audit findings highlighted the need for better communication and closer coordination of activities between the Financial Aid and Admissions and Records offices. Employing a single supervisor for both would help accomplish that goal and, I believe, achieve a broader purpose: serving out students more effectively and efficiently. In the midst of a very tight budget year, we are reviewing every aspect of the college's organizational

¹⁵ Grievant Exhibit 30.

structure and, specifically, our staffing throughout Student Services. I believe we can deploy our staff more strategically to adapt to the changing currents of demand in all those offices – currents that rise and fall with the cycles of the academic calendar.¹⁶

The President felt that a re-organization would allow the College to address all of the non-compliance issues identified in the Internal Audit and allow the College to focus on student success.

In July 2014, the Vice President helped draft a “business case” explaining why the College should eliminate Grievant’s position and the supervisor position of the Records and Admissions Unit to create a new manager’s position. He received guidance from others including the President. He reviewed how other colleges were structured. He considered what would be the best management practice. The Dean of Students was also involved in drafting the business case. The documents’ summary provided:

The consolidation of the ARS and FAS into a faculty-rank director of Admissions, Records and Financial Aid will greatly enhance the overall operation of the college. It will provide unified leadership in these two critical areas; enhance coordination among Admissions and Records, Financial Aid, and the Business Office; and help eliminate costly mistakes such as overpayments, lack of verification documentation, and incorrect awards to students. This consolidation of these positions will enable the college to correct these issues, maintain compliance with federal financial aid regulations, and serve students more effectively.¹⁷

On July 24, 2014, the Chancellor sent the President a letter stating:

This letter is sent ... in response to your request to reorganize the management structure of the Admissions & Records and Financial Aid departments by eliminating two classified positions and establishing one administrative faculty position to better manage and coordinate these critical areas. It is prudent that you have evaluated options to resolve the compliance issues that have repeatedly affected the Admissions & Records and Financial Aid departments in order to eliminate the risk of impacting the \$8,000,000 received in financial aid. With one of these positions vacant, the opportunity exists to look at all options including establishing a position at the requisite level to provide the college with a higher level of expertise.

¹⁶ Grievant Exhibit 30.

¹⁷ Agency Exhibit 11.

Having an administrative faculty member in this supervisory role has provided successful outcome for many of our other colleges within the VCCS, therefore, I approve the consolidation of these positions. While it is unfortunate that this shift will cause the layoff of one employee, it is crucial that these audit issues are resolved so students are not further negatively impacted.¹⁸

On August 4, 2014, the President sent Grievant a letter stating:

As a result of the most recent Financial Aid audit findings and to resolve the continuing audit concerns, [the College] leadership is implementing a reorganization of the student service areas to ensure compliance, student success, and greater efficiencies. As a result of this reorganization, your position is being eliminated. The date of this letter will serve as your notification date. Your position will be eliminated effective September 15, 2014. In accordance with DHRM Policy 1.30, Layoff, an effort was made to identify valid vacancies within [the College] for placement, and no positions were identified. As a result you will be placed on Leave without Pay-Layoff (LWOP-Layoff) effective September 15, 2014. ***¹⁹

On September 18, 2014, the Vice President wrote a Memorandum For [The] Record stating:

The alignment of the vacant admissions and record and financial aid under a single director resulted in the abolishment of the financial aid supervisor position. Although disciplinary action was warranted for the financial aid supervisor, the college did not take any action because the position was eliminated. While the financial aid supervisor did not receive a conduct warning, this memorandum is being placed in her file noting that she was not issued a written notice because her position was eliminated.²⁰

The College consolidated the Financial Aid Unit and the Admissions and Records Unit under one supervisor, Mr. F,²¹ a Dean of Enrollment Management. The new supervisory position required at least a bachelor's degree. Because Grievant did not have a bachelor's degree she was no longer eligible for the position. The College removed Grievant from employment. It also removed the temporary employee supervising the Admissions and Records Unit. The College was able to fund the Dean of Enrollment Management position by eliminating the two unit supervisor position.

¹⁸ Agency Exhibit 12.

¹⁹ Grievant Exhibit 38.

²⁰ Grievant Exhibit 46.

²¹ Mr. F is white and is a full time administrator.

Prior to removing Grievant from employment, the Agency considered whether Grievant could be demoted or transferred to another position within the College. The Agency was unable to find a suitable existing position. When the Agency created a faculty position to replace Grievant's position and Ms. F's position, Ms. F returned to her former position as a counselor and reported to the Vice President.

CONCLUSIONS OF POLICY

State agencies may remove employees in accordance with Department of Human Resource Management Policy 1.30, Layoff. This policy:

Permits agencies to implement reductions in the work force according to uniform criteria when it becomes necessary to reduce the number of employees or to reconfigure the work force including change of positions from full-time to part-time status. The decision to implement layoff must be nondiscriminatory and must comply with the provisions of Policy 2.05, Equal Employment Opportunity. This policy should be used with Policy 1.57, Severance Benefits

Grievant has not presented sufficient evidence to show that the Agency materially failed to comply with DHRM Policy 1.30. The Agency has presented sufficient evidence to show that it eliminated Grievant's position as part a business reorganization intended to improve the Agency's operations. It considered options other than layoff for Grievant and provided her with appropriate severance benefits.

Grievant has not presented sufficient evidence to show that the Agency removed her from her position for any reason involving her race or age. This conclusion is supported by several reasons. First, a properly functioning Financial Aid unit was essential to maximizing the number of students attending the College and providing the College with revenue. Second, the President began working for the College in March 2011. The President and the College's Director of Financial Aid had been discussing changing supervision of the Financial Aid Unit since 2011. These discussions related to the College's business needs and not about Grievant's race or age. Third, the Agency's Internal Audit focused on transactions within the Financial Aid Unit and not on Grievant's race or age. The audit findings were significant, material, and showed that Grievant had not operated the Unit in accordance with Federal requirements. Fourth, the College's managers "lost confidence" in Grievant's ability to operate the Financial Aid Unit. Grievant was the College's primary expert but she was unable to properly operate the Unit. This loss of confidence was reasonable under the facts of this case. Fifth, College managers needed someone who would properly implement complex Federal regulations and that an employee with at least a bachelor's degree would be preferred. Grievant did not have a bachelor's degree. Sixth, the College believed it could enhance communication between the Financial Aid Unit and the Admissions and Records Unit by bringing them under one supervisor. Seventh, it was necessary to eliminate Grievant's position and the supervisor position for the Admissions and

Records Unit in order to provide funding for the new manager's position. When these reasons are considered, eliminating Grievant's position to create a higher level position was logical and designed to improve the College's operations.

Grievant argued she was treated differently from how the College treated Ms. L, a white employee. Following the results of a 2012 APA audit, Ms. L was given a Group II Written Notice with suspension but without her position being eliminated and without removal from employment.²² The President did not make the decision to issue Ms. L disciplinary action instead of reorganizing her unit. Ms. L's supervisor, the Dean of Students, made that decision. The Agency showed that it intended to give Grievant a Group II Written Notice had Grievant remained an employee. The Agency showed that the magnitude of the problems identified in the APA audit of Ms. L's unit were not as severe as the problems identified in the Internal Audit of Grievant's unit. The Agency showed that Ms. L's reaction to the APA audit was different than Grievant's reaction to the Internal Audit. Ms. L focused on how to correct the problems identified in the APA audit. Grievant focused on disputing the findings of the Internal Auditor. Grievant and Ms. L were not similarly-situated employees.

Grievant argued that she was not told that her response to the audit findings would affect her position. She was not told to respond by adopting the audit findings as true and explain how she would correct them. Although it may have been a better approach to advise Grievant that the College wanted her solutions to the audit findings, it was not a misapplication or unfair application of policy. The College's failure to inform Grievant that her position might be in jeopardy was not because of Grievant's race or an objective to discriminate. In addition, Grievant had some notice of the response needed when she was copied on the email from the Acting Internal Audit Director who indicated she wanted the College to "prepare a response for each point indicating the planned response action."

Grievant argued that her office was understaffed. She notified the College of her concern. Grievant sent an email to the Dean of Students on April 10, 2014 stating:

I have two part-timers that will be leaving the [College] family within the next 1-2 months, which will leave my office 50% short. There is no way that this office can go through registration with the number of full and part-time staff that will be available.²³

Grievant argued that she had not had sufficient time to complete a Financial Aid Policy and Procedures Document. Several of the problems revealed by the Internal Audit did not relate to Grievant not having sufficient staff or enough time to draft policies. Several problems related to judgments made by Grievant that resulted in violation of Federal Regulations. Even after considering Grievant's limited staffing, there remained

²² Ms. L was later removed from employment after she accumulated a second Group II Written Notice.

²³ Grievant Exhibit 5.

sufficient evidence to justify the College's conclusion that it had "lost confidence" in Grievant's ability to supervise the Financial Aid unit.

Grievant argued that her work performance was adequate contrary to the Agency's assertions. She presented evidence showing that she received favorable performance evaluations for many years. The evidence showed that the College considered Grievant to be the most authoritative person regarding financial aid. Grievant's evaluator, the Dean of Students, was not a "financial aid person" with the same or greater knowledge of financial aid than possessed by Grievant. The Dean of Students relied on Grievant to have the necessary knowledge to serve as the College's expert on financial aid. Following the Internal Audit, College managers realized Grievant did not have the level of expertise they believed she possessed prior to the audit.

Grievant argued that the Agency's action was retaliation. No credible evidence was presented to support this allegation. Grievant's position was eliminated as a direct result of the Internal Audit and her response to the Internal Audit.

DECISION

For the reasons stated herein, Grievant's request for relief is **denied**.

APPEAL RIGHTS

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

If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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

If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific

portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

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

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

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.²⁴

[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

²⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.