Issue: Administrative Review of Hearing Officer's Decision in Case No. 9813, 9837; Ruling Date: September 7, 2012; Ruling No. 2013-3394; Agency: Virginia Commonwealth University; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA

Department of Human Resources Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of Virginia Commonwealth University
Ruling Number 2013-3394
September 7, 2012

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 9813/9837. For the reasons set forth below, EDR remands the decision to the hearing officer for consideration of the issue of whether the grievant was aware that the behavior for which she was terminated was in violation of University policy.

FACTS

The relevant facts as set forth in Case Number 9813/9837 are as follows:[1]

> 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:
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> > 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.

[1] Decision of Hearing Officer, Case No. 9813 / 9837 ("Hearing Decision"), July 11, 2012, at 2-4. (Some references to exhibits from the Hearing Decision have been omitted here.)

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:
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> - 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.
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> 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.
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> 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.
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> 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.
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> 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.[2]

In a July 11, 2012 hearing decision, the hearing officer reduced the University's issuance of the Group II Written Notice for failure to follow policy to a Group I Written Notice.[3] The hearing officer upheld the University's issuance of the Group III Written notice with removal for sharing a secured network password with other employees.[4] The grievant now seeks administrative review from EDR.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions … on all matters related to procedural compliance with the grievance procedure."[5] If the hearing officer's

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[2] *Id.* at 1.
[3] *Id.* at 6.
[4] *Id.*
[5] Va. Code § 2.2-1202.1(2), (3), and (5).

exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

Inconsistency with Agency Policy

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] All arguments made by the grievant regarding the application of DHRM Policy 1.60 to determine the appropriate level of offense for the incidents in question would be properly considered by the Director of DHRM. The grievant has requested such a review.

Failure to Mitigate

The grievant challenges the hearing officer's decision not to mitigate the Group III Written Notice with termination. She cites to her twenty years of satisfactory state service and the fact that she was, at the time, performing additional duties delegated to her by the University, as potential mitigating factors.

As to the grievant's claim of mitigation, the hearing officer found that:[8]

> 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.
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> 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

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[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] Hearing Decision at 6.

> 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.

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[9] The *Rules for Conducting Grievance Hearings ("Rules")* provide that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[10] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice,
> (ii) the behavior constituted misconduct, and
> (iii) the agency's discipline was consistent with law and policy,
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> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[11]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[12] EDR will review a hearing officer's mitigation determination for abuse of discretion,[13] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. Here, the facts upon which the hearing officer relied support the finding that termination for the Group III offense is was appropriate and did

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[9] Va. Code § 2.2-3005(C)(6).
[10] *Rules* § VI(A).
[11] *Rules* § VI(B). The Merit Systems Protection Board's approach to mitigation, while not binding on this Department, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.,* EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040 ; EDR Ruling No. 2011-2992 (and authorities cited therein).
[12] *E.g., Id.*
[13] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith … but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts … or against the reasonable and probable deductions to be drawn from the facts." *Id.*

not exceed the limits of reasonableness due to the severity of the offense, which constituted a breach in the security of the University's general ledger, Accounts Payable, and student information system.

To the extent that the grievant argues that her length of service and otherwise satisfactory performance should also have been considered as mitigating factors, we find this argument unpersuasive. While it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[14] The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. In this case, neither the grievant's length of service nor her otherwise satisfactory work performance are so extraordinary as to justify mitigation of the University's decision to dismiss the grievant for conduct that was determined by the hearing officer to be terminable due to its severity. Based upon a review of the record, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or not based on the actual evidence in the record. As such, EDR will not disturb the hearing officer's decision on that basis.

Inconsistent Discipline

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 hearing. Therefore, the grievant's evidence of inconsistent discipline can only be considered if it is "newly discovered evidence."[15] 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.[16] The party claiming evidence was "newly discovered" must show that

> (1) the evidence was newly discovered since the judgment was entered; (2) due diligence…to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; <u>and</u> (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 judgment to be amended.[17]

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[14] *See* EDR Ruling No. 2010-2363; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[15] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd on reh'g*, 399 S.E.2d 29 (Va. Ct. App. 1990) (en banc) (explaining "newly discovered evidence" rule in state court adjudications); *see also, e.g.,* EDR Ruling No. 2007-1490 (explaining "newly discovered evidence" standard in context of grievance procedure).
[16] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).
[17] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

Here, the grievant has provided no information to support a contention that the additional records should be considered newly discovered evidence 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.

Lack of Notice

Finally, the grievant asserts that "the behavior described in the Group III written notice is incorrect." As the grievant admits within her request for administrative review that she did, in fact, share her password with two subordinate employees, presumably this statement challenges the agency's indication on the Written Notice that the grievant "admitted that [she was] aware that sharing your password was in violation of university policy."[18] 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).[19] 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.[20] 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

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[18] Agency Ex. 1.

[19] *Cf.* Va. Dep't of Transp. v. Stevens, 53 Va. App. 654, 674 S.E.2d 563 (2009)(in due process context, declining to recognize "a new substantive right not to be fired at all if the employer does not warn the employee of each specific example of misbehavior for which the employee could be fired").

[20] *See* EDR Ruling No. 2011-2866.

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[21] and within University's exhibits,[22] 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.

CONCLUSION AND APPEAL RIGHTS

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. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[23] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[24] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[25]

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[21] Hearing Record at 19:26 through 20:00 (testimony of Mr. A); Hearing Record at 2:38:23 through 2:38:58 (testimony of grievant).
[22] Agency Ex. 4; Agency Ex. 6; Agency Ex. 7.
[23] *Grievance Procedure Manual* § 7.2(d).
[24] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[25] *Id.*; *see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).