

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

---

In the Matter of:	)	
	)	
ROBIN DRIVER	)	OEA Matter No. 1601-0121-05
Employee	)	
	)	Date of Issuance: July 17, 2006
v.	)	
	)	Joseph E. Lim, Esq.
OFFICE OF HUMAN RIGHTS	)	Senior Administrative Judge
Agency	)	

---

Kevin Turner, Esq., Agency Representative  
Ted Williams, Esq., Employee Representative

**INITIAL DECISION**

INTRODUCTION

On August 22, 2005, Employee filed a petition for appeal with this Office from Agency's final decision removing her for committing an on-duty or employment related act that interferes with the efficiency or integrity of government-related operations. Specifically, Employee was accused of unauthorized use of her supervisor's computer.

I held a prehearing conference on January 23, 2006 and a hearing on April 5, 2006. I closed the record at the conclusion of the hearing.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether Employee's actions constituted cause for adverse action, and if so, whether the penalty of removal was appropriate under the circumstances.

CONTENTIONS OF THE PARTIES

The agency contends that Employee was guilty of committing an on-duty or employment related act that interferes with the efficiency or integrity of government-related operations. Specifically, Employee was accused of unauthorized use of her supervisor's computer to forward her supervisor's email to her own work computer.

Employee contends that Agency's cause is not supported by substantial evidence of any wrong-doing by her and that Agency's penalty of removal should be overturned as Employee's

misconduct was committed off-duty and is not one of the listed causes for adverse action under Chapter 16.

### Undisputed facts

The following facts are undisputed:

1. Employee was employed as an Administrative Assistant assisting Farouk Hosein, the Deputy Director of the D.C. Office of Human Rights. Employee's responsibilities consisted of performing general administrative duties as well as entering data on the PASS System on Hosein's computer using a password.
2. The PASS System is the District's automated procurement system. Employee was the originator and entered transactions at the beginning stages of a procurement action on Hosein's computer. Employee also prepared drafts of the LSDBE report (Local Small and Disadvantaged Business Enterprises) summarizing Agency's procurement activities with vendors.
3. Employee was the principal assistant to Hosein and also the one Hosein relied on to deal with daily business functions when Hosein was on vacation or out of the office.
4. Employee would enter Hosein's office without his permission if she knew there were PASS transactions to be handled (Hosein did not have a problem with this). Employee was the only one who was authorized to go into his office to clear PASS transactions.
5. As a requisitioner, Employee would get notifications on her computer advising her that receipts needed to be made against a particular purchase order and she would not have to get permission from Hosein to make those receipts.
6. Hosein stated that there were times when Employee would alter his passwords and give him new passwords.
7. In order to get to the PASS system, one would have to first access the email system. The password for the PASS system is not the same password that is used to access emails. Employee had access to both the email and PASS system passwords.
8. The email system could be accessed from an offsite (non-government) computer. Hosein didn't recall if he explicitly told Employee that the only thing she could do on his computer was enter the PASS system. He assumed that it was understood by Employee.
9. Hosein stated that he does have a reasonable expectation of privacy with respect to his emails. He generally did not expect Employee or anyone else to come into his computer looking through his emails and reading them. DC government email is

public, not private communication, not only because of its principal purpose of conducting DC government business, but also because the email system permits forwarding and other wide distribution of messages without the consent of the sender. (Plaintiff's exhibit 8.)

10. Because the lock on Hosein's door was not properly installed, his staff would use a credit card or a sturdy piece of manila file to pop the lock on the door to gain entry to his office. Hosein admitted that he could have asked Employee to make a copy of the key to his office, but he did not. Hosein stated that to his knowledge, the other employees who entered his office without permission did not use his computer. Hosein stated that an employee named Alexis would come into his office to ask to make a cup of coffee (the coffee machine was his own personal property).
11. On July 18, 2005, Agency served Employee with an Advance Notice to Remove her from her position based on a charge of unauthorized use of her supervisor's computer, and an unauthorized forwarding of an email from her supervisor's computer to her own computer.
12. On August 12, 2005, Hearing Officer Francisco Negrón completed his report and recommended that Employee be removed from her position after finding that the charges against her were substantiated.
13. On August 12, 2005, Agency issued its final decision to remove Employee from her position effective immediately.

#### Evidence on Disputed Issues

- a. Farouk Hosein testified (Transcript Pg. 20-117) as follows.
  - Farouk Hosein, the deputy director for the DC Office of Human Rights, has the primary responsibility for the office's administrative activities, which includes the security of confidential information.
  - Hosein requested that all employees in the office provide their computer passwords to Employee because there were instances where employees were out for extended periods of time and he needed access to their passwords. Hosein then made a list of those passwords that were received; but did not authorize Employee to use those individual passwords or enter anybody else's computer.
  - Hosein stated that Employee did not have blanket authority to enter his computer at her own discretion and that Employee's ability to view Hosein's emails did not necessarily authorize her to read his emails.
  - Hosein testified that he went to a ceremony sponsored by the Mayor on June 29 and stated the following:
    - He left the office around 12:30 for the ceremony which was to last from 2-6 pm.

- He did not authorize Employee to use his computer prior to leaving for the function as there were no PASS transactions that had been received and outstanding at that time that Employee needed to clear.
  - Hosein turned his computer off before leaving for the function as that has been his habit for the past 30 years.
  - The ceremony actually ended at 4:45 and he got back to his office around 4:55.
  - When he returned, his office was open and saw Employee sitting at his computer and he asked “What are you doing?” Hosein looked over Employee’s shoulder and noticed that she was perusing his sent files on his computer.
  - Hosein asked Employee what she was doing and she said she was looking for something for another employee. He then noticed that Employee had sent his resume from his computer to her computer.
  - When confronted, Employee denied that she sent or received an email using Hosein’s computer.
- Hosein explained that he provided his resume in March, 2006 to the Office of Personnel regarding a Chief Procurement Officer position vacancy. Employee had forwarded that e-mail (plaintiff’s exhibit 2) along with the documents from Hosein’s computer to her computer.
  - Hosein then told Employee to come with him to her office but the document was not on her computer when they arrived.
  - Hosein then explained the situation to the director, who confronted Employee.
  - Employee eventually admitted sending the email but said it was an accident or it was a mistake.
  - Up to the June 29<sup>th</sup> incident, the witness had reasonable trust in Employee ’s ability to handle confidential information—after the incident, he lost confidence in her.
  - Hosein stated that using government property for personal gain is misuse or unauthorized use of government property. The Director of Agency had told employees not to use government property for anything other than government business.
  - Hosein stated that he believed whatever Employee did (and then denying that she did anything) created mistrust.
  - Hosein stated that he never conveyed any writing to Employee, stating that she could go into his computer for anything other than PASS.
  - Hosein conceded that government emails were public communications and could be forwarded without consent and senders/receivers of emails should have no expectation of privacy. Government emails can be obtained through the Office of the Chief Technology Officer (the mayor dictates how this is done).
  - Hosein gave Employee good evaluations and never wrote her up for any disciplinary actions. He did not agree that Employee should have been charged with unauthorized entry to his office on June 29, 2005; he said he was just upset that Employee was perusing his “sent” files on his email.
- b. Rob Mancini testified (Transcript Pg. 118-139) as follows.
- Mancini is employed by the Office of Chief Technology Officer (OCTO) and runs the citywide messaging program.

- He described the District Government’s email policy as follows:
    - The process by which email is stored: the office does tape backups for disaster recovery, they don’t actually archive. There is no citywide retention policy and the tapes are kept for about a year and if there is a problem with the server, the office can restore the data.
    - An employee could receive an email today and not delete it, each night a backup process runs and a backup of that message would be made available that same evening.
    - If an employee had an email in their “received items,” and deleted it, it goes into a folder called “deleted items” and is still on the mail server.
    - To get an item from the mail server, you can do what is called a “flush” or empty the deleted items folder.
    - He was authorized to retrieve emails from the Office of Human Rights pursuant to the Mayor’s Order 164, which governs all email searches.
    - Mancini was authorized to perform a search on Farouk Hosein’s and Employee’s email accounts—he then gave Ken Saunders a CD media on which that data was written.
    - Mancini stated that there is policy prohibiting sending mail to someone under a name other than your own and would be considered fraudulent and against OCTO policy
    - Government employees can use their computers for some personal purposes because it is not clearly defined in the OCTO policy.
  - Mancini never “lectured” employees on the privacy policy of emails and expectation of no privacy with regard to those emails. He stated that government email is subject to a public search and that if an employee received an email, they would be free to forward that email anywhere else if they wanted to (even to those outside the District).
  - In the normal course of business, there would be a lot of emails going back and forth between one government agency and another.
  - Mancini opined that applying for another job within the D.C. Government should still be considered official business and not personal.
- c. Kenneth Saunders testified (Transcript Pg. 139-200, Pg. 265-287) as follows.
- Saunders, Director for the Office of Human Rights, attended the ceremony sponsored by the Mayor on June 29, 2005. He told Mr. Hosein to make sure he shut off his computer because he didn’t think they would be back—the event was to run from 2-6pm.
  - The ceremony let out early and he and Mr. Hosein returned to the office right before 5pm. He then saw Employee sitting at Hosein’s desk. Mr. Hosein spoke to Employee so he returned to his own office.
  - Approximately 10 minutes later, Mr. Hosein came into his office and told him that Employee went through Mr. Hosein’s emails and had forwarded something to Employee’s computer.
  - Saunders went to Employee’s office, but she had left the office.
  - Saunders then spoke with Hosein about what had actually been forwarded. He then called Christina Flapps, General Counsel for OCTO, and spoke with her about the situation. Flapps stated that it was a very serious matter and that they should lock up the computer. He had

conversations with people from OCTO the following morning about doing an actual search and also notifying individuals in personnel.

- Saunders spoke with Employee on June 30, 2005 and stated that he would need her keys and ID. Employee said she was sorry and would never do anything to hurt Hosein.
- Saunders received the results of the OCTO search and stated that it became clear that there was an email sent from Mr. Hosein's computer at the time stamped on the email, but there was no email in Employee's in-box. The explanation was that the email was sent and was not undeliverable, so it must have been deleted and then deleted again, and that way there would never be any evidence that an email was sent to Employee.
- Saunders never gave Employee any authorization to review Mr. Hosein's emails and was unaware that people were entering into Mr. Hosein's office without either his permission or Mr. Hosein's permission. Saunders testified about a conversation he had with Employee concerning going into Hosein's office without authorization. He has given Employee verbal reprimands, but never written.
- Saunders stated that during the first five or six months, he gave Employee access to his calendar and email so he could call in and ask Employee about certain emails of his.
- He has a master key that opens every door in the office, but for some reason, the master key did not work in Hosein's office. He knew that a credit card was being used to gain entry to Hosein's office.
- He stated that Employee went into his office when he was not there and there were occasions when he asked Employee to go into Hosein's office and use his computer to access the PASS system when Hosein was on vacation.
- He stated that government employees should not have an expectation of privacy in their emails. He met with employees and told them to be careful with their emails and computer usage.
- Employee was charged with interfering with the efficiency and integrity of government operations. Saunders stated that he wanted Employee dismissed for her actions. The basis of the 15-day notice of proposal to remove Employee was supplied by the Office of Personnel. He signed the notice of proposal letter and stated that he spoke with individuals at OCTO and personnel who said it was a very serious situation.
- The OCTO investigation concluded that Employee was never granted the authority to receive or respond to someone else's emails.

d. Arian Rodriguez testified (Transcript Pg. 207-213) as follows.

- Rodriguez, the language access director for the DC Office of Human Rights, saw Employee in the hallway on June 29, 2005 to ask for the information on her budget program. Employee did not give her the information she requested and she does not know why.
- She did not ask Employee to go into Mr. Hosein's office to get the budget information.
- Rodriguez eventually got the budget information with the help of Kenneth Saunders.

e. Melissa Sharpe Jones testified (Transcript Pg. 213-219) as follows.

- Melissa Sharpe Jones, an Equal Opportunity Specialist Investigator/Human Resources specialist, has seen Employee go into Hosein's computer for PeopleSoft purposes. She was Employee's backup for the PeopleSoft program and used the program on very few occasions.

- She does not use the PASS system.
- f. Employee testified (Transcript Pg. 224-265) as follows.
- Employee was employed with OHR as a staff assistant for about 2 ½ years, first as Kenneth Saunders's executive assistant for about 1 ½ years before being transferred to Hosein.
  - Employee had unlimited access to Saunders's computer.
  - She also had access to Hosein's emails as Saunders would ask Employee to go and check Hosein's emails because Hosein was a person who would never check his emails.
  - Employee stated that Saunders never told Employee that her access to Hosein's office or his computer was limited.
  - When she went to work for Hosein, he never told her that she had limited access to his computer.
  - Employee had access to Hosein's computer for the PASS system.
  - The only time Hosein would tell Employee to go into his office is when there was a PASS transaction in Hosein's email.
  - Employee only had a certain level of access/authority that she could "use" from her computer and so she needed to use Hosein's computer to do other work on the PASS system. The PASS system could not be accessed from a home computer.
  - Employee used Hosein's computer for travel card payments and budget documents.
  - There were occasions where Employee would go into Hosein's office when the door was locked. Hosein was aware that Employee would use a bank card/credit card to unlock his door. Hosein never told Employee she could not do this.
  - Employee did go into Hosein's unlocked office on June 29, 2005 because Arian Rodriguez had asked her for a budget document for a meeting the next day.
  - Employee believed Hosein had the document in his office. Hosein's computer was on at the time Employee entered the office.
  - When she went to Hosein's computer, Employee hit a button and Hosein's email to personnel and the accompanying resume appeared. (See Plaintiff Exhibit 2.) Employee forwarded the resume to her computer.
  - Hosein had sent an email to employees saying that you shouldn't use your computer for personal use. (See Plaintiff Exhibit 11.)
  - Employee explained that she felt Hosein was using the computer for personal use and wanted to download the resume to either send it to the Inspector General's Office or bring it to Mr. Saunders's attention.
  - Hosein came into the room while Employee was still at the computer and Employee told Hosein that she was looking for a document for Arian Rodriguez.
  - Employee admitted that she may have emailed personal documents from her government computer.
  - Employee had no prior disciplinary actions since she has been employed with the DC government.

#### FINDINGS OF FACT

Based on the witnesses' demeanor during testimony and the documentary evidence of record,

I make the following findings of fact.

Employee enjoyed the trust and confidence of her superiors, Agency Director Saunders and her immediate supervisor, Mr. Hosein. Based on this trust, Employee has access to her superiors' computers and their respective passwords. However, her access was premised on her job of working on the PASS system. In order to access the PASS system on Hosein's computer, Employee had to open up Hosein's email folder to find the messages that pertain to the PASS system. Thus Employee was entrusted with the password to access Hosein's email.

Because of their work history, her superiors assumed Employee was aware that her access was limited to only those communications relating to the PASS system. They never gave her permission to read their emails unless it related to the PASS system.

When Employee discovered that her supervisor, Mr. Hosein, had forwarded his resume to D.C. personnel to apply for another position, she felt that Hosein had abused his position to forward his own "personal" email through the use of government email. Employee felt duty-bound to report this alleged abuse.

Because of this unauthorized reading of Hosein's email and Employee's forwarding it to her own computer, Hosein and Saunders have lost their trust in Employee. Because Employee's acts of reading and forwarding of her supervisor's email was unauthorized, I also find that this was employment related act that occurred during a time Employee was other than on duty. They believed Employee's breach of trust and confidentiality has irreparably damaged their working relationship.

### ANALYSIS AND CONCLUSIONS

#### Whether Employee's actions constituted cause for adverse action

D.C. Official Code § 1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority, to "issue rules and regulations to establish a disciplinary system that includes", *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The agency herein is under the Mayor's personnel authority.

On September 1, 2000, the D.C. Office of Personnel (DCOP), the Mayor's designee for personnel matters, published regulations entitled "General Discipline and Grievances" that meet the mandate of § 1-616.51. *See* 47 D.C. Reg. 7094 *et seq.* (2000). Section 1600.1, *id.*, provides that the sections covering general discipline "apply to each employee of the District government in the Career Service who has completed a probationary period." It is uncontroverted that Employee falls within this statement of coverage.

Section 1603.3 of the regulations, 47 D.C. Reg. at 7096, sets forth the definitions of cause for which a disciplinary action may be taken. Pursuant thereto, cause has been defined at 47 D.C. at 7096, §1603.3 as follows:

[A] conviction (including a plea of *nolo contendere*) of a felony at any time following submission of an employee's job application; a conviction (including a plea of *nolo contendere*) of another crime (regardless of punishment) at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or job activities; any knowing or negligent material misrepresentation on an employment application or other document given to a government agency; any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law; **any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations**; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious. This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking services or information from the government. [*Emphasis added.*]

"Employment related act or omission" has been defined at 47 D.C. at 7097, §1603.12 as "an act or omission, occurring during a time that the employee was other than on duty, and which adversely and materially has affected, or is likely to affect, the efficiency of government operations or the employee's performance of his or her duties."

In an adverse action, this Office's Rules and Regulations provide that the agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." OEA Rule 629.1, 46 D.C. Reg. 9317 (1999).

Here, Employee does not deny that she has opened and then forwarded her supervisor's email without his express permission. Employee believed she was within her right to report "unofficial use of government property." Whether applying for another job within the D.C. Government is strictly "personal" or "official" depends on who it benefits. The OCTO representative believed it was official business. Certainly, both the D.C. Government and Mr. Hosein stand to benefit from Mr. Hosein emailing his resume for a vacant position. The government benefits from having an important job vacancy filled and Hosein benefits from securing a job that he desires.

However, the issue before me is not whether Hosein's email is strictly personal or official business but whether Employee's action has adversely and materially affected the efficiency of government operations or the employee's performance of his or her duties.

It is clear from the evidence that Employee was a trusted Agency aide until the incident at

hand. In fact, Employee was afforded the privilege of holding the password to her supervisor's computer to conduct financial PASS transactions. This trust, however, was not a blanket authorization for Employee to peruse and copy her supervisor's electronic files. Employee actions that violate the Agency's trust in a willing and knowing manner interferes with the efficiency and integrity of government operations, especially in an agency such as the Office of Human Rights that requires confidentiality in its regular course of business.

Here, the smooth interpersonal working relationship between Employee and her immediate superiors, Mr. Hosein and Mr. Saunders, has been irreparably disrupted due to Employee's act. I have found that Employee's action has caused her superiors to lose their trust and confidence in her as their assistant.

Thus, this employment related act has adversely and materially affected the efficiency of government operations or the employee's performance of his or her duties. Accordingly, I conclude that the agency has met its burden of establishing cause for taking adverse action.

Whether the penalty of removal was appropriate under the circumstances

The last issue to be resolved is the question of whether the agency's penalty was appropriate. In *Employee v. Agency*,<sup>1</sup> this Office held that it would leave a penalty undisturbed when it is satisfied on the basis of the charge(s) sustained, that the penalty is within the range allowed by law, regulation, or guideline, and is not clearly an error of judgment.

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."<sup>2</sup> When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."<sup>3</sup>

I am satisfied that Agency has properly exercised its managerial discretion and that its chosen penalty of removal is reasonable and is not clearly an error of judgment. Accordingly, I conclude that Agency's action should be upheld.

ORDER

It is hereby ORDERED that Agency's action removing the employee is UPHELD.

.

---

<sup>1</sup> OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

<sup>2</sup> *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

<sup>3</sup> *Employee v. Agency*, OEA Matter No. 1601-0158-81, *supra*.

FOR THE OFFICE:

---

JOSEPH E. LIM, ESQ.  
Senior Administrative Judge