

Issue: Misapplication of policy regarding suspension; Hearing Date: 06/09/04;  
Decision Issued: 06/10/04; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 723



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 723**

Hearing Date: June 9, 2004  
Decision Issued: June 10, 2004

**PROCEDURAL HISTORY**

On February 25, 2004, Grievant was notified by certified mail that she had been suspended without pay pending a law enforcement investigation alleging food stamp fraud. On March 25, 2004, Grievant 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 May 11, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 9, 2004, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
Witnesses

## **ISSUE**

Whether the Agency provided Grievant with procedural due process and complied with State policy regarding her suspension pending criminal prosecution.

## **BURDEN OF PROOF**

The burden of proof is on the Grievant to show by a preponderance of the evidence 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 presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Social Services employs Grievant as an Accounting Manager B. Eight employees reported to her. Prior to her suspension, Grievant earned approximately \$60,200 per year and her husband earned \$27,500 per year. Her children receive income from Social Security.

Following Hurricane Isabel, Grievant heard a radio public service announcement indicating that people who suffered losses resulting from the Hurricane may be eligible for disaster food stamps. The announcement mentioned that the customary income limits had been changed for this program. Grievant had food spoiled by the lost of electricity resulting from the storm. She had homeowner's insurance covering damages.

Grievant went to the County Department of Social Services<sup>1</sup> and waited three hours to apply for benefits. She brought her pay-stubs and information regarding her husband's and children's incomes. She filled out a part of the application and the Eligibly Worker completed another part of the application. Based on the information provided, Grievant was determined to be eligible, and she received benefits.

Federal regulations require the Agency to investigate all of its employees receiving food stamp benefits. In mid-December 2003, the Agency's Director of Quality Management called Grievant and informed her that her receipt of benefits was being reviewed as a matter of routine practice.<sup>2</sup> Grievant informed the Director of Quality

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<sup>1</sup> The County Department of Social Services is responsible for applying policies established by the Virginia Department of Social Services.

<sup>2</sup> Grievant was one of approximately 90 employees whose application for disaster food stamp benefits was reviewed.

Management that Grievant would provide all of the requested financial information upon Grievant's return to work. Grievant had been out of the office for a few days. The Director of Quality Management received Grievant's information and then called Grievant again on January 7, 2004. The Director of Quality Management asked Grievant to provide her and her husband's bank statements. Grievant did so.

On January 8, 2004, Grievant was instructed to meet with the Employee Relations Manager. He informed Grievant that she was being suspended with pay for possible food stamp fraud. Grievant remained suspended with pay for approximately 21 days. Her investigation was referred to the County fraud investigator. County officials concluded that Grievant should be prosecuted for criminal fraud in the local court. Grievant's case is scheduled to be heard on June 21, 2004. If Grievant is found not guilty, the Agency will remove her suspension and permit her to resume her duties and will reimburse her for back pay during the period of suspension.

The Agency has not yet determined whether Grievant's suspension is a disciplinary suspension. It will address that issue after court proceedings are ended.

### **CONCLUSIONS OF POLICY**

DHRM Policy 1.60 defines suspension as:

An employee's absence from work, without pay, that an agency imposes ... to remove the employee from the workplace pending (1) an investigation related to his or her conduct, or (2) a court action.

Section VIII(B) of DHRM Policy 1.60 governs "Suspensions pending investigation or court action" as follows:

1. A suspension may be imposed pending:
  - a. an investigation of an employee's conduct by his or her agency; or
  - b. an investigation involving the employee's conduct by the State Police and/or other federal, state, or local law enforcement agencies, or a court action.

Grievant was properly suspended once the Agency began investigating her conduct. Her suspension was also appropriate once County employees began an investigation of her conduct. Suspension remains appropriate pending court action scheduled for June 21, 2004.

DHRM Policy 1.60(VIII)(B)(2) requires the Agency to issue "Written notification of a suspension pending an investigation or other action should be by memorandum, not by

the Written Notice form.” Although not presented as an exhibit at the hearing, the Agency sent Grievant a certified letter informing her of her suspension.

DHRM Policy 1.60(VIII)(B)(5) provides that the “period of suspension pending an agency investigation shall be limited to ten workdays.” The DHRM Director sent the Agency a letter dated April 5, 2004 indicating that placing employees “under investigation on indefinite pre-disciplinary leave was a misapplication ...” of DHRM Policy 1.60. The Agency was to limit pre-disciplinary leave to fourteen workdays. If the employee continued to be under investigation on the fifteenth workday, the employee would be suspended pending investigation without pay on that day. The DHRM Director approved an exception to the ten day limit thereby permitting the Agency to keep employees on suspension pending investigation without pay for up to 20 workdays.<sup>3</sup> To the extent Grievant was suspend with pay for more then 14 workdays<sup>4</sup>, the Agency’s misapplication of policy was harmless error since Grievant benefited from any such misapplication.

The ten day (modified to 14 workdays) limit on the period of suspension that applied to suspensions pending Agency investigations does not apply if “the court action or investigation by law enforcement agencies involves alleged criminal misconduct that occurred either on or off the job.”<sup>5</sup> Since the matter was referred to the County Commonwealth Attorney’s office for criminal prosecution, the 14 workday limit on suspension does not apply. Grievant may remain suspended without pay until criminal court proceedings are resolved.

Grievant contends she was denied due process because the Agency only permitted her to provide documents to the Director of Quality Management and did not permit her to explain that the Eligibility Worker at the County Department of Social Services did not do a thorough job of completing the application because the worker asked for only limited information. Grievant contends she could not be guilty of fraud when she simply provided the information requested by the Eligibility Worker. Grievant presented testimony of one of her subordinates who also sought and received disaster food stamps. This co-worker’s application was reviewed by another person within the Agency. The co-worker was permitted to fully explain the circumstances of her claim and based on that explanation, the Agency chose to permit the co-worker to return to work and to reimburse the disaster food stamps incorrectly paid. The co-worker was not prosecuted for fraud. Grievant argues she should have been treated similarly to the co-worker thereby avoiding being prosecuted for fraud.

Procedural due process does not require the same outcome for similarly situated individuals – it only requires that certain procedures be implemented before a State

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<sup>3</sup> Agency Exhibit 1.

<sup>4</sup> Grievant was suspended with pay for approximately 21 days.

<sup>5</sup> DHRM Policy 1.60(VIII)(B)(6).

Agency takes action affecting employment.<sup>6</sup> Prior to suspension, the Agency does not need to definitively resolve the propriety of the allegations against Grievant. It must merely make an initial check against a mistaken decision to suspend.<sup>7</sup> In this case, the Agency investigated the claim internally<sup>8</sup>, solicited information from Grievant, and notified her of the charges against her before suspending her. Grievant was given the opportunity to file a grievance to challenge the Agency's action. She could have presented whatever information she wished during the step-process and during the hearing before the Hearing Officer. Grievant has received adequate procedural due process.<sup>9</sup>

In sum, Grievant has not established the misapplication of any State policy governing her suspension such that she would be returned to work with pay. Grievant has not established that the Agency denied her procedural due process.

### **DECISION**

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

### **APPEAL RIGHTS**

You may file an administrative review request within **10 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.

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<sup>6</sup> It is unclear whether the facts surrounding Grievant's case were sufficiently the same as the facts surrounding the co-worker's case to conclude that Grievant and the co-worker were treated inconsistently. Based on the evidence, it appears possible that they may have been treated differently in terms of the consequences to them for having obtained food stamps for which they were not entitled. It is also possible that the Agency mistakenly was lenient with the co-worker who should have been referred to the local agency for fraud. In either instance, the issue of whether fraud was committed by an employee was not before the Hearing Officer.

<sup>7</sup> See, Cleveland Board of Education v. Loudermill et al., 470 U.S. 532, 546 (1985).

<sup>8</sup> Grievant argues the Agency failed to comply with its own internal procedures outlines in Grievant Exhibit 1. Assuming for the sake of argument that the Agency did not comply with every requirement of that memorandum, it is not a DHRM policy or an Agency policy. The document merely outlines how the Agency hopes to review employee applications for disaster food stamps.

<sup>9</sup> If the evidence is viewed in a light favorable to Grievant, she has established that the Agency did a poor job of investigating her. Procedural due process does not require the Agency to provide her with the best possible investigation as long as its investigation as reasonable. Although the Agency's investigation may not have been perfect, it was adequate to withstand Grievant's challenge based on procedural due process.

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

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-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>10</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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>10</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.