

Issue: Group III Written Notice with termination (falsifying a State document, providing incomplete information to receive benefits, attempting to conceal information during an investigation); Hearing Date: 12/03/04; Decision Issued: 12/14/04; Agency: DSS; AHO: David J. Latham, Esq.; Case No. 7893



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7893

Hearing Date: December 3, 2004
Decision Issued: December 14, 2004

PROCEDURAL ISSUE

This hearing was initially docketed for November 12, 2004. However, due to the unavailability of participants, the hearing was postponed and rescheduled for December 3, 2004. Subsequent to the hearing, the hearing officer's full hearing docket prevented issuance of a decision until December 14, 2004.¹

APPEARANCES

Grievant
Attorney for Grievant
Five witnesses for Grievant
Chief Financial Officer
Advocate for Agency
Two witnesses for Agency

¹ § 5.1 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004, requires that a grievance hearing must be held and a written decision issued within 35 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

ISSUES

Did the grievant's actions warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Did the agency retaliate against grievant?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice for falsification of state records, providing false and incomplete information to receive food stamp benefits, and attempting to conceal material information during an official investigation.² As part of the disciplinary action, grievant was removed from state employment. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.³ The Department of Social Services (DSS) (Hereinafter referred to as "agency") has employed grievant for six years. She was a Financial Services Manager.⁴

On September 18, 2003, Hurricane Isabel caused widespread power outages and property destruction throughout much of the Commonwealth. The agency administered a Disaster Food Stamp Program that provided food stamps to persons who met specified income requirements, resource availability, and damage estimates. Grievant lost power at her home and a tree fell on the house causing significant damage. Grievant claimed lost food from her refrigerator and freezer in the amount of \$420, and sustained over \$3,000 in property damage and associated expenses.

On October 1, 2003, grievant went to the county DSS office to file an application for emergency food stamps.⁵ Grievant was given a form and completed that portion of Section I which required her name, address, names of household members, and their dates of birth. The county DSS interviewer filled in the amount of income in Section I, and Sections II, III, & IV as she interviewed grievant.⁶ The interviewer asked grievant about the income of each family member, her bank balances, expenses incurred, and wrote what the grievant told her. It was the practice of interviewers not to request verification of the information but to accept whatever applicants said. Grievant reviewed the

² Agency Exhibit 1. Written Notice, issued August 13, 2004.

³ Agency Exhibit 2. *Grievance Form A*, filed August 17, 2004.

⁴ Agency Exhibit 4. *Employee Work Profile Work Description*, effective October 1, 2002.

⁵ An applicant for food stamps must file her application in her county of residence.

⁶ Agency Exhibit 3I. *Application for Emergency Food Stamps*, October 1, 2003.

application and certified by signing it that the information she gave was correct and complete. Based on the information provided by grievant, the county DSS office calculated that grievant was entitled to \$663 in food stamps. Grievant subsequently received \$663 in food stamps.

The federal Department of Agriculture has oversight responsibility for the food stamp program. It routinely requires that the DSS must audit both a one percent sample of all food stamp applications, and one hundred percent of the applications filed by DSS employees. The DSS Quality Performance (QP) Manager who reviewed grievant's application became suspicious because grievant reported no cash on hand, and almost no money in either her checking account (\$1.00) or savings account (\$5.32), her expenses appeared high, and grievant did not report any insurance deductible amount.⁷ She contacted grievant on December 4, 2003 and requested documentation (including grievant's bank statement) to verify some of the dollar amounts grievant had given to the interviewer. She asked grievant if she had provided complete information on her food stamp application and grievant did not say she had anything else to provide.

Grievant's bank statement for the relevant period (September 2003) was four pages long. Grievant submitted to the QP Manager a highly redacted version of her bank statement which revealed only two lines from page one and one line from page four.⁸ Because the bank statement was incomplete, the QP Manager contacted grievant again and requested her complete bank statement. Grievant never gave her complete bank statement to the QP Manager. Because of this and other inconsistencies in the application, the QP Manager referred the case to the Division of Fraud Management which assigned the case on January 8, 2004 to a fraud investigator in the county DSS office.⁹

Grievant had a household of six people (grievant, husband, and four children). A household of six people in the county where grievant resides qualified for emergency food stamps only if the net household income and available resources, minus disaster expenses, are less than \$2,557. The Fraud Investigator obtained payroll verification from the State and determined that grievant's actual net pay for the disaster period was \$3,782.54;¹⁰ grievant had reported only \$3,200. She also determined that grievant's husband had net wages of \$2,354.77 during the disaster period; grievant reported only \$2,000. Grievant's income and resources of \$6,072.56, minus her claimed disaster expenses of \$3,445.00, equals available disaster income of \$2,627.56. Thus, had grievant reported the correct income amounts for herself and her husband, she would not have qualified for food stamps.

⁷ Agency Exhibit 3L. *Review Form for Food Stamp Emergency Disaster Cases*, December 2, 2003.

⁸ Agency Exhibit 3I. Redacted bank statement, September 1-30, 2003.

⁹ Agency Exhibit 3B. *Investigation Summary*.

¹⁰ Agency Exhibit 3B. *Ibid*.

The investigator determined that she would have to interview grievant and did so on January 28, 2004. During that interview, grievant told the investigator that, as a DSS employee, she had access to information about the Disaster Food Stamp program and had reviewed that information before applying for food stamps. When confronted about the understatement of her income, grievant acknowledged that she may have been ineligible for food stamps. During the interview, the investigator asked grievant whether the application accurately represented the household income, resources, and expenses at the time of the application. Grievant responded, "Yes." At no time did grievant disclose that her children had income.

At some point during the investigation, the investigator learned that the grievant's current husband is not the biological father of three of grievant's children. Because there was a potential that grievant's children might be receiving Social Security benefits if their biological father is deceased, she requested a report from the State Verification Exchange System (SVES) that provides information on Social Security Administration (SSA) benefits. She requested the report on the morning of February 2, 2004; there is a 24-hour delay before the SVES report is received. That same afternoon, grievant's husband came to the office to bring a missing page of the bank statement. In response to the investigator's question, the husband acknowledged that grievant's children receive SSA benefits.¹¹

The SVES report revealed that three of grievant's children each receive a monthly SSA benefit of \$597.00. When this additional income of \$1,791 was added to the household income, the recalculation showed that grievant's actual income and resources minus expenses during the disaster period was \$4,588.83 – more than \$2,000 above the food stamp limit of \$2,557.¹² The matter was subsequently referred to the Commonwealth's Attorney for prosecution.¹³

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with

¹¹ Exhibit 3C. SSA benefit statements for grievant's children

¹² Exhibit 3B. *Ibid.*

¹³ See Grievant Exhibit 20. Circuit Court trial transcript, June 21, 2004. The Court, applying the much higher standard of establishing guilt beyond a reasonable doubt, dismissed the charges, in part because the agency failed to authenticate key evidence during trial.

the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions the grievant must present her evidence first and prove her claim by a preponderance of the evidence.¹⁴

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of the Commonwealth of Virginia's Department of Personnel and Training Manual *Standards of Conduct* Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.¹⁵ Falsifying any records including reports, time records, or other official state documents is one example of a Group III offense. The offenses listed in the Standards of Conduct are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head undermines the effectiveness of the agency's activities or the employee's performance should be treated consistent with the provisions of the Standards of Conduct.¹⁶

¹⁴ § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

¹⁵ Agency Exhibit 8. Section V.B.3, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

¹⁶ Agency Exhibit 8. Section V.A. *Ibid.*

Black's Law Dictionary defines "falsify" as, "To counterfeit or forge; to make something false; to give a false appearance to anything." The word "falsify" means being intentionally or knowingly untrue. The agency has borne the burden of proof to show that grievant knowingly reported information she knew to be untrue.

The most credible evidence demonstrates that when grievant applied for food stamps, she knowingly underreported the amount of her own income to the interviewer. Second, she also knowingly underreported the amount of her husband's income. Third, she knowingly failed to disclose that each of three of her children had monthly income from the Social Security Administration. Thus, grievant reported total household income of \$5,200 when, in fact, the actual reportable household income was \$8,033.83. If the underreporting had been de minimus, it could be attributed to mistake or error. However, grievant's reporting of income of more than 35 percent below actual household income was so egregious that it could have only been knowing and deliberate.

Grievant knew when she signed the application that the amounts listed as income were incorrect. As an accounting manager with years of accounting education and experience, grievant has extensive practice in reviewing documents for numerical accuracy. During the investigation of this matter, grievant was asked by both the QP Manager and later, by the fraud investigator, if the application was correct and contained all household income. On both occasions grievant failed to disclose what she clearly knew to be underreporting of income. Accordingly, the agency has shown, by a preponderance of evidence that grievant falsified a food stamp application, received benefits for she was not eligible, and twice concealed information that was material and relevant to an official investigation.

Grievant contends that she should be reinstated because of a previous hearing decision by another hearing officer. That hearing resulted from a grievance challenging the agency's suspension of grievant without pay during the investigation.¹⁷ Because of agency testimony during the hearing, the hearing officer noted as a finding of fact that the agency said it would remove grievant's suspension and reimburse her for back pay if the Circuit Court found her not guilty. There are four reasons why the previous hearing officer's finding of fact is of no consequence in this hearing. First, the previous hearing officer made a finding of fact based solely on agency testimony in the previous hearing. This hearing officer is not bound either by the testimony in a prior hearing or by the decision of another hearing officer.¹⁸

¹⁷ Agency Exhibit 2. In Case # 723, issued June 10, 2004, the hearing officer concluded that the agency had neither misapplied policy by suspending grievant nor denied her procedural due process.

¹⁸ A hearing officer must make his decision based solely on the evidence presented during the hearing over which he presides. He cannot consider evidence from any other hearing.

Second, the prior hearing officer did not *decide* that the agency was obligated to remove grievant's suspension or reimburse her for back pay. The prior hearing officer simply recorded what the agency said it *intended* to do at a future time. Third, the agency had stated its future intention, however, subsequent to the criminal trial, the agency reassessed its position and decided to pursue a different course. This hearing officer has no authority to require the agency to follow through on a previously stated intention. Such a decision is within the prerogative of the agency pursuant to Va. Code § 2.2-3004.B, which states, in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government." Fourth, the Circuit Court did not find grievant not guilty; it only dismissed the charges against her. Thus, while grievant was not convicted, her case was just not fully adjudicated on all available evidence.

Grievant attempts to shift responsibility for the underreporting of her household income to the eligibility worker who interviewed her. She claims that the eligibility worker "averaged her income" thus somehow resulting in a significantly lower stated income. She further avers that the eligibility worker told her that she would not need the children's income and, that the worker suggested some of the dollar amounts on the application. The eligibility worker completed hundreds of applications during a relatively brief time after the disaster. She has no specific recollection of grievant and testified as to her regular and consistent practice when taking the applications. She testified credibly that her practice was to record on the application whatever dollar amounts the applicant provided, that she would not have "averaged income," and, that it was not her practice to suggest dollar amounts. The eligibility worker further testified that she always asked whether children had income and recorded whatever the applicant stated.¹⁹ The hearing officer finds the eligibility worker's testimony more credible and logical than grievant's self-serving attempt to shift blame to the worker. Moreover, even if the eligibility worker entered an incorrect amount on the application, grievant certified that the amounts were correct when she signed the form. Since grievant knew the amounts were not correct, she knowingly provided false information.

Grievant contended during the hearing that she had no knowledge of food stamp regulations and requirements prior to applying for benefits on October 1, 2003. However, the fraud investigator reported (and recalled clearly under oath) that grievant told her on January 28, 2004 that she had reviewed the rules before she applied for benefits. Grievant demonstrated that she obtained a printed copy of the regulations in mid-January 2004 following her suspension. However, this does not prove that she had not reviewed the regulations online or in some other form prior to October 1, 2003. As the fraud investigator has no motivation to falsify her testimony about grievant's statements, and because she created a

¹⁹ Agency Exhibit 8. Example of someone else's application completed by the eligibility worker demonstrating that her practice was to list the income of children if reported by the applicant.

contemporaneous written record of the conversation shortly after it occurred, her testimony is deemed more credible than that of grievant.

In addition, the undisputed testimony of the eligibility worker established that all applicants waiting in line for benefits were given a flyer that explained, *inter alia*, that all unearned income must be included when reporting household income to the interviewer. Grievant's suggestion that she doesn't understand the term "unearned income" is not only disingenuous but spurious. Grievant has attended two state universities where she majored in accounting and has been employed during the past decade as a fiscal technician, a senior accountant, an agency management lead analyst, and an accounting manager.²⁰

Retaliation

Grievant asserts that the Chief Financial Officer (second level supervisor above grievant) retaliated against her by disciplining her after the agency had indicated it would end her suspension if she was found not guilty in court. Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.²¹ To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Based on grievant's testimony and evidence, she has failed to prove that she engaged in a protected activity. Accordingly, grievant has not satisfied either the first or third prongs of the test and, therefore, has not demonstrated that the disciplinary action was retaliatory.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and removal from employment issued on August 13, 2004 are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

Grievant has not shown that the agency retaliated against her.

²⁰ Agency Exhibit 5. Application for Employment, November 19, 1999.

²¹ EDR *Grievance Procedure Manual*, p.24

APPEAL RIGHTS

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

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

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

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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 15 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 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.²² 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.²³

²² An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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]

David J. Latham, Esq.
Hearing Officer