

Issue: Group III Written Notice with termination (welfare fraud); Hearing Date: 01/20/05; Decision Issued: 02/11/05; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 7948



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 7948**

Hearing Date: January 20, 2005  
Decision Issued: February 11, 2005

**PROCEDURAL HISTORY**

On September 16, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*You were in [Circuit Court] on August 3, 2004, and pled guilty to fraud. As part of a plea agreement, the charge was reduced to misdemeanor welfare fraud -- petty larceny. Based on the totality of facts in this case, you committed intentional fraud to receive disaster food stamp benefits.*

On October 5, 2004, 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 December 6, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 20, 2005, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee

Agency Advocate  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for conviction of welfare fraud.

## **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. 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 employed Grievant as an Administrative Program Support Specialist III until her removal effective September 20, 2004. She had been employed by the Agency for approximately 12 years without prior disciplinary action. She received favorable evaluations of her work for the Agency.

Following Hurricane Isabel, Grievant applied for disaster food stamp benefits at a local department of social services. She listed all of the persons in her household but reported only an estimate of her own income. She listed as “NA” the income of two other adults in the household because she did not know their incomes. When their incomes were considered, Grievant was not eligible for disaster food stamps. Grievant received food stamps based on the information she provided in her application. The Agency conducted an audit of all of its employees receiving disaster food stamp benefits. The Fraud Investigator concluded that Grievant should be referred to the local Commonwealth’s Attorney for prosecution.

Grievant was indicted for a felony, namely, welfare fraud in an amount in excess of \$200.00 pursuant to *Va. Code* §§ 18.2-95 and 63.522. She retained an attorney. On August 3, 2004, Grievant and her attorney appeared in the local Circuit Court. Her attorney advised her that he believed she would be convicted of the felony if she went forward to trial. He told her she should accept a plea agreement that would result in a lesser punishment. Grievant resisted but then relented to her attorney’s recommendation. The Circuit Court entered an order stating, in part:

Whereupon, the accused was arraigned and pleaded **GUILTY** to the misdemeanor as charged in the amended indictment pursuant to *Alford vs. N.C.*, 400 U.S. 25, (1970).

The Court, having made inquiry and being of the opinion that the accused fully understood the nature and effect of said plea, the penalties that may be imposed upon conviction and waiver of trial by jury and of appeal, and finding that the plea was voluntarily and intelligently made, proceeded to hear and determine the case without a jury, and having heard the evidence and argument of counsel, finds the accused **GUILTY** of welfare fraud (Virginia Code Section 18.2-96 and 63.2-522), a misdemeanor, as charged in the amended indictment. \*\*\*

The Court certifies that at all times during this proceeding the defendant was present in person and her attorney was likewise present in person and capably represented the defendant.<sup>1</sup>

The Court sentenced Grievant to 12 months in jail with the sentence suspended for three years. She was ordered to make full restitution in the amount of \$553. Grievant was disqualified from the Food Stamps program for 12 months because a Court found her guilty of committing an intentional program violation of Food Stamp policy.

### CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” DHRM § 1.60(V)(B).<sup>2</sup> Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

DHRM § 1.60(V) lists numerous examples of offenses. These examples “are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may

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<sup>1</sup> Grievant Exhibit 9.

<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

be considered unacceptable and treated in a manner consistent with the provisions of this section.”

An Alford plea means:

An individual accused of [a] crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.<sup>3</sup>

Under an Alford plea,

A defendant maintains innocence while entering a plea of guilty because the defendant concludes that his interests require entry of a guilty plea and the record before the court contains strong evidence of actual guilt .... Guilty pleas must be rooted in fact before they may be accepted.<sup>4</sup>

When the totality of this case is considered, the Agency’s decision to discipline Grievant must be upheld. Grievant incorrectly completed the application for benefits and was then convicted of welfare fraud. One of the Agency’s duties is to audit and refer for criminal prosecution individuals the Agency believes have committed welfare fraud. Employing someone convicted of welfare fraud may undermine the Agency’s ability to assert the seriousness of welfare fraud when conducted by others. The Agency’s judgement that Grievant’s conviction may undermine its effectiveness is supported by the evidence.

Grievant contends she did not engage in the behavior for which she was convicted. She contends that she is not guilty of welfare fraud. She presented the evidence at hearing that she would have presented to a Circuit Court had she not made an Alford plea. The evidence of the Commonwealth’s Attorney that resulted in Grievant entering an Alford plea was not presented. Although Grievant may have maintained her innocence, the entry of an Alford plea requires the existence of facts showing strong evidence of guilt.

Grievant contends that her attorney forced her to enter the Alford plea when she had expected to present her case for trial. Although Grievant may have felt she had no choice in the matter, she clearly did. The Circuit Court asked her questions and had she answered them correctly, the Court would have understood her preference to take the matter to trial. The Court inquired and was of the opinion that Grievant understood the terms of her plea.

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<sup>3</sup> Alford v. N.C., 400 U.S. 25, 37, (1970).

<sup>4</sup> Perry v. Commonwealth, 33 Va. App. 410, 412 (2000).

Grievant contends the disciplinary action should be mitigated. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution....”<sup>5</sup> Under the EDR Director’s *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.” In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

### DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

### 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. 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

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<sup>5</sup> *Va. Code § 2.2-3005.*

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 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. 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>6</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>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.