

Issue: Group III Written Notice with termination (food stamp fraud); Hearing Date: 02/07/05; Decision Issued: 02/22/05; Agency: DSS; AHO: David J. Latham, Esq.; Case No. 7963: **Administrative Review: HO Reconsideration Request received 03/09/05; Reconsideration Decision issued 03/29/05; Outcome: No newly discovered evidence or incorrect legal conclusions. No basis to change original decision.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 7963

Hearing Date: February 7, 2005  
Decision Issued: February 22, 2005

APPEARANCES

Grievant  
Attorney for Grievant  
One witness for Grievant  
Chief Financial Officer  
Advocate for Agency  
Two witnesses for Agency

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?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice for misrepresentation to obtain food stamps and conduct unbecoming an agency

employee.<sup>1</sup> As part of the disciplinary action, grievant was removed from state employment effective August 27, 2004. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.<sup>2</sup> The Department of Social Services (DSS) (Hereinafter referred to as "agency") had employed grievant for 18 years as an administrative specialist.

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. The disaster period was established as September 18 through October 17, 2004.

On October 2, 2003, grievant filed an application for emergency food stamps.<sup>3</sup> Grievant was given a form and filled in the names of household members, Social Security numbers, and dates of birth; the interviewer asked grievant questions about income, sources of income and Parts II and III. It was the practice of interviewers not to request verification of the information but to accept whatever applicants said. Applicants were allowed to list their net income rather than gross income. Based on the information provided by grievant, the local DSS office calculated that grievant was entitled to \$465 in food stamps. Grievant subsequently received \$465 in food stamps.<sup>4</sup>

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 a one hundred percent of the applications filed by DSS employees. The case was assigned to a fraud investigator in the city where grievant had filed her application. Prior to beginning the investigation, grievant was interviewed and given an opportunity to provide any income and resources information that might be missing from her application. Grievant did not disclose any additional income or resources. Grievant was placed on paid suspension beginning March 16, 2004. On March 31, 2004, grievant was placed on leave without pay because the investigation was still in progress. The fraud summary report disclosed numerous discrepancies including underreporting of grievant's income, underreporting of the male adult's income, falsely denying the existence of checking and savings accounts, and failing to report large balances in the savings accounts. However, because the application form did not contain grievant's signature, the fraud summary report concluded that the overpayment had resulted from agency error

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<sup>1</sup> Agency Exhibit 1. Group III Written Notice, issued August 27, 2004.

<sup>2</sup> Agency Exhibit 2. *Grievance Form A*, filed September 26, 2004.

<sup>3</sup> An applicant for food stamps must file her application in her county or city of residence.

<sup>4</sup> Agency Exhibit 4. Application for Emergency Food Stamps, October 2, 2003.

(failure to obtain grievant's signature).<sup>5</sup> Because of this technical error, the agency permitted grievant to return to work on May 24, 2004.

On June 7, 2004, the Fraud Program Manager received an anonymous call from grievant's coworker stating that grievant had been bragging about obtaining food stamps and not getting caught. After consultation with the agency's Commissioner, it was decided to reopen the investigation, using a fraud investigator from a county DSS office to conduct an independent investigation. On June 9, 2004, grievant was placed on leave without pay and remained in that status until her removal from employment on August 27, 2004.

Grievant had a household of four people (grievant, an adult male, and two children, ages 17 and 9).<sup>6</sup> The Fraud Investigator determined that grievant's actual net pay for the disaster period was \$1,293.17; grievant reported only \$600. The investigator also determined that the adult male had net wages of \$790.67 from Aramark Corp; grievant did not report either this income or the employer. Grievant reported only that the adult male worked as a landscaper but stated that he had not worked since the hurricane. Grievant reported that her children had no income; in fact, she received child support during the disaster period in the amount of \$364.28.<sup>7</sup> Grievant reported that she did not have a checking account; in fact, she did have a checking account which had a balance of \$612.11 on October 2, 2003.<sup>8</sup> Grievant reported that she did not have a savings account; in fact, she had a savings account with a balance of \$2,062.84. Grievant also failed to report that the adult male also had a savings account with a balance of \$5,037.37. Thus, grievant reported income and resources of only \$600.00; in fact, she had available income and resources of \$10,160.44 on the day she filed her application. Had grievant reported the correct dollar amounts on her application, she would not have qualified for food stamps.

In January 2005, grievant began to make installment payments towards the debt of \$465 of food stamps to which she was not entitled.

#### 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

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<sup>5</sup> Agency Exhibit 2. Fraud Summary Report, May 14, 2004.

<sup>6</sup> Grievant reported the incorrect birth date for the oldest child on the application. In fact he was born on February 6, 1986.

<sup>7</sup> Grievant Exhibit 13. Bank statement, October 2003.

<sup>8</sup> *Ibid.*

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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

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<sup>9</sup> § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

<sup>10</sup> Agency Exhibit 5. Section V.B.3, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

<sup>11</sup> Agency Exhibit 5. 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.

It is undisputed that grievant underreported her income and available financial resources on the food stamp application. She underreported her own income by approximately 54 percent. She underreported the adult male's income by 100 percent because she failed to disclose a second job. She did not disclose that she had a checking account and therefore underreported her balance in the account by 100 percent. She did not report the existence of two different savings accounts with a total of more than \$7,000 in balances. It is interesting to note that in all cases grievant either *underreported or failed to report* her available resources and income. There was no instance in which grievant overreported any income or resources.

A preponderance of evidence establishes that grievant underreported her own income, failed to report the male adult's second job and income from that employment, and failed entirely to report the existence of a checking account and two savings accounts with substantial amounts of money on deposit in those accounts. Grievant claims that the eligibility worker asked her to estimate her own income so grievant rounded her income to the nearest hundred dollars. If one does not know their income, an estimate may be acceptable. However, grievant knew what her income was because she made a conscious decision to round down to the nearest hundred dollars. Grievant said she did not report any income for the adult male's second job because she did not know how much he earned.

Of particular concern is grievant's failure to indicate that she and the adult male in the household each had savings accounts with large balances. Grievant did not offer any credible reason for her failure to include these very significant financial resources on her application. She claims that she told the eligibility worker that she could not access the accounts due to the hurricane and that because they were not accessible, she did not have to list them. In fact, during the hearing, grievant admitted that the accounts were inaccessible only from September 18-21, 2003. Thus, by the time grievant filed her application on October 2, 2003, she had been able to access the accounts for at least 10 days. Grievant's bank statement reflects several transactions beginning on September 20, 2003 including multiple withdrawals of cash from an automated teller machine on September 23 & 26, and October 1, 2003.<sup>12</sup>

Grievant also contended that she did not report one of the savings accounts because the money in that account was an insurance settlement (as the result of a 2002 house fire) and that the insurance company had restricted

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<sup>12</sup> Grievant Exhibits 12 & 13. Bank statements for September and October 2003, respectively.

use of the money only for replacement of items destroyed in the fire. The fraud investigator contacted the insurance company and ascertained that there were no restrictions on the insurance settlement money; the funds were available to the customer without restriction on its use.<sup>13</sup>

Grievant attributes her failure to report child support payments to the eligibility worker's failure to ask *specifically* about such payments. However, grievant knew that the two children had income yet she failed to report that information. She secondarily attempts to excuse not reporting this income on the basis that the children's monthly checks did not arrive between September 18 and October 2, 2003.<sup>14</sup> In fact, grievant knew that her children's child support checks were routinely deposited in her checking account on or about the 11<sup>th</sup> day of each month. Thus, grievant knew that she would receive this income on or about October 11, 2003 – well within the disaster period. Grievant's explanations for her actions are weak, and in the case of the savings accounts, simply not credible. Rather, her actions are consistent with a knowing attempt to underreport in order to qualify for food stamps.

Grievant points out that she received the letter of intent to remove her from employment on the day she called the governor's office to complain about her lengthy suspension. Since the letter was mailed to grievant at least one or more days before she received it, it is clear that the agency could not have been aware of her telephone call since that occurred after the agency had already mailed the letter of intent to grievant.

### DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and removal from employment issued on August 27, 2004 are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

### 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.

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<sup>13</sup> Agency Exhibit 3. Disaster Food Stamp Summary report from Fraud Investigator.

<sup>14</sup> Grievant Exhibit 20. Letter from grievant to Chief Financial Officer, August 19, 2004.

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 14<sup>th</sup> St, 12<sup>th</sup> 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.<sup>15</sup> 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>16</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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David J. Latham, Esq.  
Hearing Officer

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<sup>15</sup> 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).

<sup>16</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.





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

DIVISION OF HEARINGS

**DECISION OF HEARING OFFICER**

In re:

Case No: 7963

Hearing Date:	February 7, 2005
Decision Issued:	February 22, 2005
Reconsideration Request Received:	March 9, 2005
Response to Reconsideration:	March 29, 2005 <sup>17</sup>

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.<sup>18</sup>

OPINION

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<sup>17</sup> Pursuant to Section VII.A of the Department of Employment Dispute Resolution (EDR) *Rules for Conducting Grievance Hearings*, decisions on requests for reconsideration or reopening are usually issued within 15 days from receipt. In this instance, the decision was delayed slightly because during mid-March 2005 the EDR Hearing Division relocated to different office space.

<sup>18</sup> § 7.2 EDR *Grievance Procedure Manual*, effective August 30, 2004.

Grievant requests that the hearing be reopened for three reasons: i) she disagrees with the facts found by the hearing officer, ii) she disagrees with the hearing officer's assessment of her credibility and, iii) a witness did not appear for the hearing. None of the three reasons cited by grievant meet the criteria cited above to reopen a hearing. Grievant has neither proffered any newly discovered evidence nor demonstrated any evidence of an incorrect legal conclusion. Accordingly, grievant's request to reopen the hearing is denied. However, in the alternative, grievant's request will be treated as a request for reconsideration in order to respond to her concerns.

Grievant correctly observes that the decision erroneously stated the extent of grievant's and the adult male's underreported income. Grievant actually reported her monthly income as \$1200 – an underreporting of her own income by 8 percent. She reported the male's monthly income as \$645 (\$150 weekly x 4.3) – an underreporting of 23 percent.

Grievant argues that she did not report available resources of \$7,712 in checking and savings accounts because the eligibility worker said she did not have to report this amount if it was inaccessible at the time of the hurricane. The hearing officer finds grievant's testimony not credible for three reasons. First, the instructions on the application form require that the amounts listed should be for the disaster *period* – not the day of the hurricane. The disaster period was from September 18 through October 17, 2003. Second, the application form asks for resources available for use. Grievant knew that her checking and savings accounts were available for use when she filed the application on October 2, 2003 because she withdrew money from her account on multiple occasions in late September and early October. Third, grievant's answer to question 6 in Part II of the application stated that she did not have any money in bank accounts that was not available to her. Grievant's truthful answer – that, in fact, the money in her accounts *was available*

program's definition of income or the Internal Revenue Service's definition of income. The fact is that grievant knew she was receiving child support money and did not disclose it.

3. Grievant listed an incorrect date of birth for her husband's son. Not only did she list an incorrect year, but also an incorrect month and an incorrect date of the month. The child was actually 17 years old but grievant reported him as being only 11 years old. Grievant had no satisfactory reason for significantly underreporting his age.
4. Grievant claimed expenses of \$100 for dependent care – claiming that she paid her mother this amount to care for grievant's nine-year-old son. It is difficult to believe that a grandmother would charge money to care for her own grandson during an emergency.
5. Grievant lived with the adult male for *four years* and is caring for and raising his son. However, she claimed that she had no knowledge of where the adult male was employed. It is unbelievable that grievant would not know where her cohabiting partner works, particularly when he had a son at home.
6. Grievant's testimony during the hearing was inconsistent with respect to the length of the disaster period. At one point she testified that the period was one month; subsequently, she said that she assumed that the disaster period was only the first week after the hurricane.
7. Grievant contends that funds in the adult male's account were unavailable because an insurance company restricted their use to replacement of property damaged in a fire at another residence. Grievant contends that Grievant Exhibit 14 constitutes evidence that the money "had to be used for replacement." In fact, Exhibit 14 is only a contents claim showing how the insurance company calculated a settlement amount by subtracting a depreciation amount from an agreed-upon cost of repairing, cleaning or replacing each item to arrive at an actual cash value settlement amount. There is no evidence or documentation to support grievant's contention. In fact, the insurance agent who handled the claim stated that there were no restrictions on the funds and that the payee could use the replacement money for any purpose. In the absence of evidence to the contrary, the fraud investigation contact with the insurance agent is deemed more credible than grievant's contention.

Grievant attempts to impute knowledge to the eligibility worker by arguing that the worker "knew" grievant's ATM had resumed operations (p. 6, grievant's

request for reopening). Since the eligibility worker could not be identified and did not testify, it is not possible to know what her knowledge was.

Grievant argues that the decision is contrary to law but fails to cite any constitutional provision, statute, regulation, or judicial decision that the decision purportedly contradicts. Grievant suggests only that there was no evidence to support the decision. In fact, there is documentary evidence in the form of the application, the agency's investigation, grievant's bank statements, etc. In addition, the grievant's inconsistent statements and less than credible testimony outweigh her denial of intentional underreporting of income and resources.

Grievant suggests that the hearing should be reopened to obtain testimony from a witness about the scope and quality of eligibility worker training. There is insufficient basis to reopen the hearing to hear this witness for three reasons. First, before the conclusion of the hearing, grievant did not request a continuance of the hearing to obtain the testimony of this witness. Second, there is no evidence to show that the witness (fraud supervisor for city Department of Social Services) was the person who conducted eligibility worker training. Third, there is no evidence to show who trained the worker that took grievant's application because the worker cannot be identified from the available evidence.

### Summary

Even though the decision erroneously stated the extent of grievant's underreporting of her own income and the male adult's income, the fact remains that grievant did underreport both incomes, failed to report child support payments, and did not disclose the available resources of checking and savings accounts. Moreover, all of grievant's misreporting was *underreporting* that inured to her benefit. When considered in conjunction with the inconsistencies in her stories and less than credible explanations, the totality of the evidence is sufficient to conclude that grievant knowingly misrepresented her circumstances when she filed the application.

### DECISION

Grievant has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered grievant's arguments and concludes that there is no basis to reopen the hearing. Further, after careful consideration of grievant's arguments, there is no basis to change the Decision issued on February 22, 2005.

### APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

### ***Judicial Review of Final Hearing Decision***

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.<sup>19</sup>

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David J. Latham, Esq.  
Hearing Officer

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<sup>19</sup> 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).