

Issue: Group III Written Notice with termination (food stamp fraud); Hearing
Date: 02/17/05; Decision Issued: 02/18/05; Agency: DSS; AHO: David J.
Latham, Esq.; Case No. 7981



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7981

Hearing Date: February 17, 2005
Decision Issued: February 18, 2005

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Fraud Program Manager
Advocate for Agency
One witness 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 falsification of state records by providing false and incomplete information to

receive food stamp benefits.¹ As part of the disciplinary action, grievant was removed from state employment effective November 9, 2004. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.² The Department of Social Services (DSS) (Hereinafter referred to as "agency") had employed grievant for 13 years as a child enforcement support 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, 2003.

On October 4, 2003, grievant filed an application for emergency food stamps.³ Grievant was given a form and completed Parts I through VI. 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. Grievant reviewed the application and certified by signing it that the information she gave was correct and complete.⁴ 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.

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 referred the case for possible fraud investigation because grievant reported only \$3.08 cash on hand, and did not indicate that she had either a checking account or savings account.

Grievant had a household of four people (grievant, her brother, and two children, ages 21 and 18). The Fraud Investigator determined that grievant's actual net pay for the disaster period was \$2,250.17;⁵ grievant reported only \$1,700. The investigator also determined that grievant's brother had net wages

¹ Exhibit 1. Group III Written Notice, issued November 9, 2004.

² Exhibit 2. *Grievance Form A*, filed November 22, 2004.

³ An applicant for food stamps must file her application in her county of residence.

⁴ Exhibit 4. Application for Emergency Food Stamps, October 4, 2003.

⁵ Exhibit 7. Grievant's bank statement shows payroll deposits of \$1,881.17 from her state employment, and \$457.88 from her part time job during the disaster period. [NOTES: The October 15, 2003 deposit from grievant's part-time job included \$40.00 cash back. The Fraud investigator reported part-time job income as \$369 rather than \$457.88. It is unknown how the investigator determined the lesser figure. In any case, grievant's corrected disaster allotment calculation used the smaller amount of \$369 in determining that she was not entitled to receive food stamps.]

of \$2,012 during the disaster period;⁶ grievant reported only \$1,000. Grievant's 21-year-old son was employed and had income of approximately \$532 during the disaster period, grievant reported that he did not have any income. Grievant reported that she had no money in a checking account; in fact, she did have a checking account which had a balance of \$1,628.79 on October 3, 2003. Had grievant reported the correct dollar amounts on her application, she would not have qualified for food stamps.

A hearing officer conducted an administrative disqualification hearing to determine whether grievant, in applying for food stamps, had committed an intentional program violation pursuant to Va. Code § 63.2-524. Testimony at the hearing was not taken under oath. The hearing officer found uncontested evidence that grievant failed to file a complete and correct application for food stamps benefits. However, utilizing the higher standard of proof required in such a hearing, the hearing officer held that evidence was not "clear and convincing" enough to demonstrate an intentional program violation.⁷

In April 2004, grievant repaid the agency for the \$465 of food stamps to which she was not entitled.⁸

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 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

⁶ Exhibit 4. Brother's pay stub for two of the four weeks in the disaster period.

⁷ Exhibit 5. Administrative Disqualification Hearing Decision, August 27, 2004.

⁸ Exhibit 9. Letter from agency to grievant, May 5, 2004 acknowledging receipt of the repayment.

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.⁹

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.¹⁰ 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.¹¹

Grievant argues, in effect, that the decision rendered in the administrative disqualification hearing should be dispositive of the decision in the instant case. Her argument is not persuasive for five reasons. First, the administrative disqualification hearing was conducted pursuant to a Va. Code § 63.2-524 for the sole purpose of determining whether grievant was entitled to receive emergency food stamps. The instant hearing is conducted pursuant to Va. Code § 2.2-3000 to adjudicate a grievance filed subsequent to the agency's decision to remove her from employment. Thus, the two hearings were conducted for different purposes, pursuant to entirely unrelated statutes.

Second, this hearing officer is not bound by the findings, opinion, or decision of another hearing officer. This hearing officer is required to adjudicate the grievance based solely on the testimony and evidence presented during this

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

¹⁰ Exhibit 6. Section V.B.3, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

¹¹ Exhibit 6. Section V.A. *Ibid.*

hearing. Third, the disqualification hearing was conducted *without* sworn testimony. Accordingly, the evidence presented in that hearing is not as reliable as that obtained during the grievance hearing when all witnesses were placed under oath prior to testifying. Fourth, the disqualification hearing appears to have been very brief (the entire transcript is only 15 pages), while the grievance hearing explored the issues in depth during a two and a half hour hearing. Finally, and most significantly, in the disqualification hearing, an intentional program violation could be found only if the evidence met the “clear and convincing” evidentiary standard. In contrast, the standard of proof in a grievance hearing is merely a preponderance of evidence. Accordingly, the level of proof in a grievance hearing need not rise to the higher evidentiary standard required in a disqualification hearing.

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.¹² She underreported her own income by approximately 25 percent. She failed to include any of the income from her part-time employment. She underreported her brother’s income by more than 50 percent. She did not disclose that she had a checking account and therefore underreported her balance in the account by 100 percent. 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.

Grievant explained her underreporting of income by saying that she just “guessed.” Grievant has been employed by the state for 13 years; it is difficult to believe that she did not have a better idea of the amount deposited in her checking account every two weeks. Grievant said she “wasn’t thinking” about the income from her part-time job. Grievant’s overall income is modest and obviously the income from her second job is both important and necessary to cover her living expenses. It is not credible that grievant would forget either her second job or that the income from that job amounted to about twenty percent of her state income. Grievant’s “guess” about her brother’s income amounted to more than a 50 percent underreporting of his income. While one might understandably be off by a few dollars when guessing, 50 percent is too significant to be ignored.

¹² During its investigation, the agency learned that the eligibility worker had misinformed grievant regarding the reporting of her son’s income. The worker incorrectly advised that such income would not have to be reported because her son was a full-time student. Therefore, the agency did not hold grievant accountable for the failure to report her son’s income.

Of particular concern is grievant's failure to indicate that she has a checking account and that she had a significant balance (\$1,628.79) in that account on the day before she filed her application for food stamps. Her bank statement reveals deposits of both her state paycheck and her part-time job paycheck in the four days just before she applied for benefits. These deposits totaled \$1,161.64. During that same period, grievant made purchases and withdrawals totaling only \$458.12. Accordingly, grievant knew, or reasonably should have known, on October 4, 2004 that she had a significant amount of money in her checking account. Grievant did not offer any credible reason for her failure to include this very significant financial resource on her application.

A preponderance of evidence establishes that grievant underreported her own income and her brother's income, and failed entirely to report the existence of a checking account and the substantial amount of money on deposit in that account. Grievant's explanations for her actions are weak, and in the case of her checking account, simply not credible. Rather, her actions are consistent with a knowing attempt to underreport in order to qualify for food stamps.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and removal from employment issued on November 9, 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.
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.¹³ 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.¹⁴

[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

¹³ 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).

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

