

Issue: Group III Written Notice with termination (food stamp fraud); Hearing  
Date: 03/01/05; Decision Issued: 03/02/05; Agency: DSS; AHO: David J.  
Latham, Esq.; Case No. 7989



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 7989

Hearing Date: March 1, 2005  
Decision Issued: March 2, 2005

**PROCEDURAL ISSUES**

Grievant points out that during the pre-termination procedures, as well as during the grievance resolution steps, the agency failed to comply with the Standards of Conduct requirement to provide her with due process, viz., the requirement to provide "an *explanation* of the agency's evidence in support of the charge..."<sup>1</sup>(Italics added). The agency claims that its "Notice of Intent" letter satisfied this requirement.<sup>2</sup> The hearing officer disagrees with the agency. The Notice of Intent letter merely notifies grievant of the agency's conclusion that she committed fraud; however, it fails to *explain* the evidence upon which the agency relied to reach that conclusion. Nevertheless, despite this defect during the pre-termination process, this hearing has afforded grievant access to all information necessary to present her case. Thus, to the extent that grievant's due process rights were adversely affected by the agency's failure to comply with Policy 1.60, this hearing has cured that defect.

Grievant requested as part of her relief that attorneys' fees be paid by the agency if she should retain an attorney. Grievant was represented at the hearing by an advocate, but not by an attorney. The Code of Virginia provides that

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<sup>1</sup> Agency Exhibit 6. Section VII.E.2, Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, September 16, 1993. For an explanation of due process requirements, see generally *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

<sup>2</sup> Agency Exhibit 1. Letter to grievant from Exception Processing Manager, October 15, 2004.

grievants may be represented in EDR hearings by legal counsel or lay advocates.<sup>3</sup> Thus, grievants may be represented by attorneys, foreign attorneys, non-lawyers, paralegals, union representatives, friends, or even spouses. However, the statute provides for the award of attorneys' fees only to *attorneys*. In the absence of any clarifying language, it is presumed that the General Assembly meant that fees may be awarded only to those attorneys who are duly licensed in Virginia and who are in good standing with the Virginia State Bar.<sup>4</sup>

### APPEARANCES

Grievant  
Representative for Grievant  
Chief Financial Officer  
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? Did the agency discriminate against grievant based on her race?

### FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice for fraud to obtain food stamps.<sup>5</sup> As part of the disciplinary action, grievant was removed from state employment effective October 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>6</sup> The Department of Social Services (DSS) (Hereinafter referred to as "agency") had employed grievant for 18 years as an administrative assistant.

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

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<sup>3</sup> Va. Code § 2.2-3004.F.

<sup>4</sup> See *Addendum to Decision of Hearing Officer*, Case # 7908, issued January 21, 2005, for a more complete analysis of this issue.

<sup>5</sup> Agency Exhibit 1. *Group III Written Notice*, issued October 27, 2004.

<sup>6</sup> Agency Exhibit 1. *Grievance Form A*, filed November 19, 2004.

damage estimates. The disaster period was established as September 18 through October 17, 2003.

Grievant did not have knowledge of the Disaster Food Stamp program prior to applying for benefits. She learned from a neighbor that applications could be filed in the DSS office in the county where she resides. When she went to the DSS office the following day, she did not know how the program worked and did not know the income level necessary for a family of five to qualify for food stamps.

On September 29, 2003, grievant filed an application for emergency food stamps.<sup>7</sup> Grievant was given a form and filled in the names of household members, Social Security numbers, dates of birth, and income; the interviewer asked grievant questions about Parts II, III, and IV, and filled in those sections. Grievant advised the eligibility worker that she did not know her husband's income; the worker told grievant to estimate his income. It was the practice of interviewers not to request verification of the information but to accept whatever applicants said. The eligibility worker received only two hours of training prior to taking applications from disaster applicants. 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 \$553 in food stamps. Grievant subsequently received \$553 in food stamps.<sup>8</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 one hundred percent of the applications filed by DSS employees. After the Quality Management unit reviewed the case, it was assigned on March 24, 2004 to a fraud investigator in the county 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. The initial investigation disclosed discrepancies including underreporting of grievant's income, underreporting of her husband's income and, underreporting of checking and savings account balances. It also appeared that grievant failed to report income earned by her oldest daughter. On April 27, 2004, the agency referred the case to the Commonwealth's Attorney for prosecution. Ultimately, the Commonwealth's Attorney declined to prosecute the case and grievant repaid \$553 to the agency.<sup>9</sup>

Grievant had a household of five people (grievant, an adult male, and three children, ages 19, 16, and 14). The Fraud Investigator determined that

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<sup>7</sup> An applicant for food stamps must file her application in her county or city of residence.

<sup>8</sup> Agency Exhibit 4. *Application for Emergency Food Stamps*, September 29, 2003.

<sup>9</sup> Grievant Exhibit 5. Letter from grievant's attorney to Commonwealth's Attorney, October 12, 2004. See also Grievant Exhibit 19, receipt for repayment of \$553 to agency, October 18, 2004.

grievant's actual net pay for the disaster period was \$1,650.83; grievant reported \$1,600. The investigator also determined that grievant's husband had net wages of \$1,994.64; grievant reported \$1,390. Grievant reported a checking account balance of \$15; the actual balance was \$3.95.<sup>10</sup> Grievant correctly reported a regular savings account balance of \$5.00. However, the application failed to reflect that she also had a Christmas account balance of \$50.28 and a vacation account of \$25.02. Grievant's husband had both a checking account and a savings account, of which grievant is joint owner; the total balance in both accounts was \$14.91. Grievant's daughter also had both a checking account and a savings account, of which grievant is joint owner; the balances in those accounts were \$599 and \$874.34, respectively. Grievant did not report either her husband's or daughter's accounts because the eligibility worker asked her only about her own accounts; the worker did not ask whether the husband and children had separate accounts. Grievant's daughter worked in August 2003 and thereafter went to school. She did not work during the disaster period although she started a new job in mid-October 2003.

Although the agency had an initial concern about the expenses grievant reported, it concluded as a result of its investigation that grievant's reported disaster expenses were reasonable and acceptable. When the agency's fraud department evaluates the dollar amounts that applicants have estimated on their application, it allows estimates within \$50 of the actual figure as an acceptable margin of error.

### 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:

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<sup>10</sup> Agency Exhibit 5. Grievant's bank statement, September 2003. [NOTE: The agency determined the checking account balance to be \$73.95, however, that included \$70 that was transferred to the account later on the day that grievant had filed her application. Thus, at the time of filing her application, the actual balance was \$3.95.]

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, such as claims of racial discrimination, the grievant must present her evidence first and prove her claim by a preponderance of the evidence.<sup>11</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>12</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>13</sup>

*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.

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<sup>11</sup> § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

<sup>12</sup> Agency Exhibit 6. Section V.B.3, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

<sup>13</sup> Agency Exhibit 6. Section V.A. *Ibid.*

Grievant's application for food stamps does not fully reflect all available income and resources available during the disaster period. However, an examination of the differences in their totality does not support a conclusion that grievant knowingly reported information she knew to be untrue. Grievant's estimate of her income was only \$50 less than her actual income; this is within the margin of error allowed by the Fraud unit. Grievant's estimate of her husband's income was \$604 less than his actual income. However, grievant testified that she told the eligibility worker that she did not know her husband's income. The worker asked grievant to estimate his income and grievant did, based on her recollection of his paycheck a few years earlier. She also assumed that he had salary increases in the interim. In using these figures to calculate the monthly income, a multiplication error resulted in an estimate of \$1,390. If the multiplication error had not been made, her estimate would have been \$1,790 – about \$200 below his actual income. Since the eligibility worker stated that an estimate was acceptable, grievant relied on the worker's representation.

The eligibility worker asked for grievant's savings and checking account balances. Grievant correctly estimated the amount in her savings account and actually overestimated the checking account balance. Grievant forgot about her separate Christmas account and vacation account balances; however, the amounts in these accounts were de minimus and within the \$50 margin of error allowed by the Fraud unit. The eligibility worker did not ask grievant whether her husband had a separate bank account and grievant did not think to mention it. In any case, the amount in her husband's accounts was also negligible (\$14.91).

The most significant underreporting of resources was grievant's daughter's checking and savings accounts. The daughter had established savings and checking accounts a few years ago. She attends college and works during the summer to earn money for college expenses. The agency imputes knowledge of the accounts to grievant because grievant is a joint owner of the accounts. However, grievant has no involvement with the accounts because the daughter manages them totally. Thus, when she filed the food stamp application, grievant had no knowledge of the balances in her daughter's bank accounts. The eligibility worker did not ask whether grievant's children had bank accounts and grievant did not think to mention the daughter's account.

The agency suggests that grievant *knew* that she should mention her daughter's bank accounts. However, the agency has failed to prove that grievant had sufficient knowledge of the disaster food stamp program to know what she was required to disclose. Grievant's testimony, which the agency did not rebut, establishes that she had no knowledge of the program when she applied for food stamps. Moreover, even the eligibility worker apparently had insufficient knowledge because she failed to ask whether other family members had bank accounts. The evidence reveals that eligibility workers were trained for only two hours before attempting to administer a program about which they had no prior exposure. The agency cannot reasonably impute to grievant more knowledge

about the program than its own eligibility workers, who were supposed to be administering the program. Under these circumstances, it must be concluded that the failure to report the daughter's bank accounts was not intentional.

After investigating grievant's reported disaster expenses, the agency concluded that not only was there no concern about the amounts reported but that the amounts appeared "very reasonable" for the losses grievant sustained.<sup>14</sup>

The agency did not offer the eligibility worker's testimony during this hearing. Therefore, grievant's testimony regarding the worker's representations is the only available evidence about how the application process occurred. The hearing officer found grievant to be a very credible witness. The agency failed to offer any evidence that would impugn grievant's credibility. In fact, her 18-year employment with the agency has been blemish-free and her work has been satisfactory. There is no evidence to suggest that the grievant has ever been dishonest in her work or other dealings with the agency.

#### Racial discrimination

Grievant alleged in her written grievance that the agency discriminated against her on the basis of her race (black). An employee may demonstrate racial discrimination by showing direct evidence of intentional discrimination (specific remarks or practices), circumstantial evidence (statistical evidence), or disparate impact. In this case, grievant has not presented any testimony or evidence whatsoever to support her allegation. There is more to proving a charge than merely making an allegation. Grievant has failed to bear the burden of proof to support her charge.

#### Summary

The agency has not shown, by a preponderance of evidence, that grievant intentionally submitted a fraudulent food stamp application. While the total income and resources of the household were understated, grievant has provided reasonable and credible explanations for the underreporting. The underreporting occurred because of grievant's lack of knowledge about the program and because of her reliance on the eligibility worker's representations.

### DECISION

The disciplinary action of the agency is reversed.

The Group III Written Notice and removal from employment issued on October 27, 2004 are hereby RESCINDED. Grievant is reinstated to her former position or, if occupied, to an objectively similar position. Grievant is awarded full

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<sup>14</sup> Fraud Manager's testimony.



back pay, from which any interim earnings must be deducted, and full benefits and seniority are restored.

Grievant has failed to prove that the disciplinary action was discriminatory.

### 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 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

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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

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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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.