

Issue: Group III Written Notice with termination (food stamp fraud); Hearing  
Date: 03/07/05; Decision Issued: 03/08/05; Agency: DSS; AHO: David J.  
Latham, Esq.; Case No. 8002



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8002

Hearing Date: March 7, 2005  
Decision Issued: March 8, 2005

**APPEARANCES**

Grievant  
Attorney 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?

**FINDINGS OF FACT**

The grievant filed a timely grievance from a Group III Written Notice for intentional fraud in obtaining disaster food stamp benefits.<sup>1</sup> As part of the

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<sup>1</sup> Agency Exhibit 1. Group III Written Notice, issued December 6, 2004.

disciplinary action, grievant was removed from state employment effective December 6, 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 four years as a payment processing clerk.

On September 18, 2003, Hurricane Isabel caused widespread power

expenses regardless of the disaster.<sup>7</sup> Grievant claimed “hotels” expense on the application but later admitted that she did not stay in any hotels during the disaster period.

Grievant and the adult male lived together for several years. The adult male is the father of grievant’s daughter, who was born three weeks prior to the disaster. Grievant and the adult male have maintained a joint checking account for several years; the adult male deposited his pay into the joint checking account.<sup>8</sup> During the entire disaster period, grievant was on maternity leave from her position and stayed at home with her newborn daughter.

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. 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.<sup>9</sup> However, as the hearing officer noted, if the standard of proof had been lower, there were inconsistencies that raise a question about grievant’s credibility.

### 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

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<sup>7</sup> Grievant Exhibit 3. Sworn statement signed by grievant, April 9, 2004.

<sup>8</sup> Agency Exhibit 5. Joint bank account of grievant and adult male, September 18-October 20, 2003. Adult male’s payroll deposits made on September 25 and October 8, 2003.

<sup>9</sup> Agency Exhibit 7. Administrative Disqualification Hearing Decision, October 21, 2004.

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>10</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>11</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>12</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. Grievant contends that while the Written Notice charged her with "intentional fraud," there is no such language in the Standards of Conduct policy. The Standards of Conduct lists only *examples* of unacceptable behavior.<sup>13</sup> The Notice of Intent referenced in the Written Notice makes clear that one notable aspect of grievant's offense was the omission of the adult male's income from her disaster food stamp application. Thus, regardless of the words used in the Written Notice and Notice of Intent, the

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<sup>10</sup> § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

<sup>11</sup> Agency Exhibit 8. Section V.B.3, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

<sup>12</sup> Agency Exhibit 8. Section V.A. *Ibid.*

<sup>13</sup> Agency Exhibit 8. Section V.A. *Ibid.*

meaning is clear – grievant was disciplined for falsifying an official state document.

Grievant argues that because the agency cannot prove the elements of “intentional fraud,” it cannot prevail in this case. In a criminal proceeding, grievant’s argument would have merit. However, in order to prevail in this administrative hearing, the agency need only demonstrate by a preponderance of evidence that grievant was reasonably informed of the offense she committed, and that she committed the offense.

Although the administrative hearing decision records were admitted as evidence in this case, 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 hearing. The 2004 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. The disqualification hearing appears to have been very brief (the entire transcript is only nine pages), while the grievance hearing explored the issues in depth during a three-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 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.

Grievant testified that the eligibility worker who took her application told her to include on the form anyone who was in her house at the time of the disaster. While this is not correct according to the Disaster Food Stamp Program, the agency has not shown that the grievant knew otherwise. The agency did not offer the eligibility worker as a witness and therefore, the grievant’s testimony about what she was told is unrebutted. Accordingly, there is no finding of misrepresentation with regard to grievant’s inclusion of the visiting aunts and cousin.

However, grievant’s inclusion of the adult male with whom she had cohabited for several years and who was the father of her newborn baby is more problematical. Grievant asserts that she was unaware of the adult male’s income because he had left the household in April 2003 and purchased his own nearby residence (10 minutes away). At that time, the male had been employed as the assistant manager of a grocery store. She states that when he moved out of her residence he told her that he quit his job. Grievant allowed him to move back into her house in early September and he was there during the disaster period. Although grievant was not working during this entire time, she claims she was unaware that he was still working full-time every day at the same grocery store.

Grievant also denies knowledge of the fact that he deposited his pay into their joint checking account even though she admitted maintaining the check book.

It is difficult to believe that grievant would allow a partner who had left her months earlier to move back into her house with no questions asked. It is even less credible that grievant would not have noticed his comings and goings on a regular basis as he went to his assistant manager job each day for over a month. Moreover, the evidence reflects that grievant made a purchase with her check card at the very grocery store where he worked (# 628) on the same day she filed her application for food stamps.<sup>14</sup> There are a number of other grocery stores located closer to grievant's residence than Store # 628. Finally, it is undisputed that grievant had for years maintained a joint checking account with the adult male and that he deposited his pay into that account. Grievant received the monthly bank statements and kept her checkbook current but claims she had no knowledge that he was depositing money into the account. Grievant asserts that she never looked at the monthly bank statements and kept her checkbook current by periodically calling the bank for her balance. Grievant's denial of all the above facts is just not credible. Accordingly, it is concluded that grievant knew, or reasonably should have known, of the adult male's income.

There is a real question as to whether the adult male should have been listed as a member of the household since he owned and maintained his own residence a few minutes away, and purportedly was only visiting for a few weeks. However, if grievant listed him as a household member for the purpose of obtaining food stamp benefits, then she was also obligated to include his income. Her failure to include his income constitutes falsification.

It is undisputed that grievant underreported available income and over reported her disaster expenses on the food stamp application. She underreported her own income by \$58, and underreported the male adult's income by \$2,057. She over reported expenses for rug cleaning by \$357. She reported child care expenses of \$150 that were not a direct result of the disaster. Finally, she reported that she had incurred expense to stay in hotels when, in fact, she did not incur such an expense. It is interesting to note that in each instance, grievant's underreporting of income and over reporting of expenses all resulted in an *understatement* of her disaster income limit - the key determinant of whether one qualifies for food stamps. There was no instance in which grievant overreported any income or understated her expenses. Therefore, the totality of the circumstances in this case demonstrates, by a preponderance of evidence, that grievant falsified an official state document.

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<sup>14</sup> Compare Agency Exhibit 7 and Grievant Exhibit 5. The adult male's payroll record reflects that he was employed at store # 628.

## DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and removal from employment issued on December 6, 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 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.