

Issue: Misapplication of Policy (suspension); Hearing Date: 07/23/04; Decision
Issued: 07/27/04; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 770



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 770

Hearing Date: July 23, 2004
Decision Issued: July 27, 2004

PROCEDURAL HISTORY

On April 28, 2004, Grievant filed a grievance challenging the Agency's suspension of her employment. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On June 24, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 23, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Advocate
Witness

ISSUE

Whether the Agency failed to comply with DHRM Policy 1.60 by suspending Grievant from employment.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency misapplied State policy. 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 Virginia Department of Social Services employs Grievant as a Support Enforcement Specialist at one of its offices. Her position is in Pay Band 4. She has been employed as a Support Enforcement Specialist for 16 years. Neither party presented evidence of the precise nature of Grievant's duties, however, she is employed within the Division of Child Support Enforcement. No evidence of disciplinary action or unsatisfactory work performance relating to Grievant was introduced during the hearing.

In March 2004, Grievant and several other employees met with the District Manager. The District Manager informed them that the State was investigating them because they applied for food stamps following Hurricane Isabel. Shortly thereafter, Grievant met with another person who asked her questions about her application for food stamps. Grievant cooperated with the investigation. On March 26, 2004, the District Manager called Grievant and told her that she was being suspended because she received food stamps and that there were inconsistencies in her application. Grievant was to be suspended for 14 days. She was escorted to her office so that she could remove her personal items and then was escorted out of the office building.

After the 14 days passed, Grievant was permitted to use her annual leave and she did so. She ran out of annual leave by June 1, 2004. Her medical benefits ended April 30, 2004. She is diabetic and has upper respiratory problems. Because of the loss of income, she had to choose between paying her rent and paying for necessary medical expenses. She has had her telephone service disconnected. She is able to pay only the minimum interest payment on her credit card.

On April 6, 2004, Grievant was referred to a local fraud investigator based on the allegation that Grievant failed to give clear and accurate information in reference to her monthly net household income and resources during the Disaster Food Stamp relief period of October 1, 2003 to October 30, 2003. The investigator quickly investigated the matter and appears to have concluded the investigation sometime in April 2004 by referring the matter for an Administrative Disqualification Hearing.

An Administrative Disqualification Hearing was scheduled for July 15, 2004 before an Administrative Hearing Officer. For an unknown reason, the hearing was continued until sometime in August 2004. Such a hearing is “held to decide if a member of the food stamp household intentionally violated Food Stamp Program rules. This is called an ‘intentional program violation.’”¹ If the Administrative Hearing Officer finds that Grievant is guilty of an intentional program violation, Grievant would be disqualified from the Food Stamp Program for 12 months for the first offense, 24 months for a second offense, and permanently for a third offense. Since the proceeding is administrative in nature, Grievant would not be subject to any criminal penalty or imprisonment.

The Agency has taken no disciplinary action against Grievant. Agency managers will determine whether to take disciplinary action after the administrative hearing is concluded.

There is no court action or criminal proceeding pending against Grievant as a result of her application under the Disaster Food Stamp program.

CONCLUSIONS OF POLICY

DHRM Policy 1.60 defines suspension as:

An employee's absence from work, without pay, that an agency imposes ... to remove the employee from the workplace pending (1) an investigation related to his or her conduct, or (2) a court action.

Section VIII(B) of DHRM Policy 1.60 governs “Suspensions pending investigation or court action” as follows:

1. A suspension may be imposed pending:
 - a. an investigation of an employee's conduct by his or her agency; or
 - b. an investigation involving the employee's conduct by the State Police and/or other federal, state, or local law enforcement agencies, or a court action.

2. Written notice of suspension

Written notification of a suspension pending an investigation or other action should be by memorandum, not by the Written Notice form.

3. Application of accrued annual leave

¹ Hearing Officer Exhibit 1.

- a. At an employee's request, and at the agency's option, the employee's accrued annual leave may be charged to the period of suspension pending an investigation or court action so that he or she does not experience a loss of earnings, provided that the employee has sufficient accrued annual leave.
- b. If, following the conclusion of the investigation, the agency determines that a disciplinary action, such as disciplinary suspension or discharge, is not appropriate, any accrued annual leave that was applied to the period of suspension pending investigation or court action shall be reinstated .

5. Provisions specific to suspension pending agency investigation

a. Length of suspension

- (1) The period of suspension pending an agency investigation shall be limited to ten workdays.
- (2) If the agency does not make a decision regarding disciplinary action within ten workdays, the employee shall be permitted to return to work pending completion of the agency investigation.

b. The investigation concludes no employee misconduct

If the agency investigation clears the employee of any misconduct, the agency shall reinstate the employee with back pay for the period of suspension.

6. Provisions specific to suspension pending investigation by law enforcement agencies or pending a court action

a. Length of suspension

The ten day limit on the period of suspension that applies to suspensions pending agency investigations (see section VIII(B)(5)(a) above) shall not apply if:

- (1) the court action or investigation by law enforcement agencies involves alleged criminal misconduct that occurred either on or off the job; or

permitted. DHRM Policy 1.60 provides that a suspension pending Agency investigation shall not exceed ten workday. Grievant remains suspended.

The ten workday period does not apply if there is pending court action or an investigation by law enforcement agencies involving alleged criminal misconduct. No court action is pending against Grievant. NTf44644 Tc 0.2599 Tw 12 0 066189 Tm(s)Tj12.01289 Tc 01

The ten workday period may also be extended if Grievant has engaged in misconduct of such a nature that to retain her in her position could constitute negligence in regard to the Agency's duties to the public and other State employees. Evidence regarding the breadth and scope of Grievant's duties was not presented. No evidence was presented suggesting Grievant's duties included authorizing or handling food stamps. No evidence was presented suggesting Grievant had any involvement in the design or implementation of policy affecting the food stamp program. It is unclear what interaction Grievant has with other employees or the public. No credible evidence was presented suggesting Grievant could cause harm to others if she is reinstated. Accordingly, there was no basis to extend the ten workday time period of suspension.

Third, the Agency failed to permit Grievant to return to work after the ten workday suspension pending completion of the Agency's investigation.

DECISION

For the reasons stated herein, the Agency is ordered to (1) reinstate Grievant to her former position or, if occupied, to an objectively similar position, (2) provide Grievant with full back pay from March 27, 2004 forward (less interim earnings) but excluding a ten workday³ suspension, and (3) restore Grievant's full benefits and seniority. The Agency is further ordered to comply with DHRM Policy 1.60.

No evidence was presented showing that an administrative fraud investigator is a law-enforcement officer of a law enforcement agency.

³ Evidence was presented showing that the DHRM Director authorized the Virginia Department of Social Services to limit pre-disciplinary leave to 14 workdays. If employees continued to be under investigation on the 15th days, they would be suspended pending investigation without pay on that day. The DHRM Director added:

Since the fraud investigations are being carried out at the local government level, VDSS has requested and DHRM has approved an exception to the ten-day limit on the suspension period pending completion of the investigation. VDSS may keep employees on suspension pending investigation without pay for up to 20 workdays. During their suspension, employees may use their annual leave to continue to be paid even though they are considered to be on leave without pay.

The Hearing Officer will not address the extent of the DHRM Director's authority to change State policy to address a specific matter before an Agency. The Hearing Officer will apply DHRM Policy 1.60 as written which permits a ten workday suspension. To the extent that time period was extended to 20 days is a matter best resolved by the Department of Human Resource Management.

APPEAL RIGHTS

You may file an administrative review request within **10 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 14th St., 12th 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 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 10 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 10-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.⁴

[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].

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer