



COMMONWEALTH of VIRGINIA

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TO: MARGARET SCHULTZE, Commissioner
Virginia Department of Social Services

FROM: ERIC J. REYNOLDS *EJR*
Assistant Attorney General

DATE: November 21, 2014

SUBJECT: 22 VAC40-295-140 (TANF)

I am in receipt of the attached regulation regarding exclusion periods for Intentional Program Violations in the Temporary Assistance for Needy Families ("TANF") cash assistance program. You have asked the Office of the Attorney General to review and determine if the State Board of the Virginia Department of Social Services has the statutory authority to promulgate the proposed regulation and if the proposed regulation comports with applicable state and federal law.

Individuals receiving TANF benefits who have been found to have committed an Intentional Program Violation, whether by a court, pursuant to an administrative disqualification hearing, or by waiving his or her right to an administrative disqualification hearing, become ineligible to receive the benefits for a specified period of time, depending on the number of times such a finding was made against the individual. This regulation currently sets such periods of ineligibility at six months for the first offense, 12 months for the second offense, and permanently for the third offense. The proposed change to this regulation modifies these time periods to be consistent with the periods of ineligibility required in the Supplemental Nutrition Assistance Program ("SNAP"): twelve months for the first offense, 24 months for the second offense, and permanently for the third offense.

It is my opinion that the State Board of DSS has the authority to promulgate this regulation, subject to compliance with the provisions of Article 2 of the Administrative Process Act ("APA") and has not exceeded that authority.

It is my view that this regulation is not exempt from but is subject to the procedures of Article 2 of the APA pursuant to Virginia Code § 2.2-4006(A)(4)(a). If you have any questions or need additional information about these regulations, please contact me at 786-3450.

cc: Kim F. Piner, Esquire
Attachment

Project 4065 - Proposed

DEPARTMENT OF SOCIAL SERVICES

Exclusion Periods for Intentional Program Violations

22VAC40-295-140. Intentional program violation (IPV).

A. The agency shall ensure and document that a clear and full explanation is given to the applicant or recipient of:

1. The eligibility requirements for the type of assistance he is requesting or receiving;
2. His responsibility to give complete and accurate information related to his eligibility and to report promptly and fully any changes in his circumstances that would affect his eligibility for services or assistance or the amount thereof; and
3. The penalties for knowingly falsifying or deliberately withholding such information. The worker shall explain fully what types of changes in his circumstances would have an effect on the grant or services.

B. The local agency shall conduct an investigation of an allegation that an individual has committed an IPV, regardless of the TANF payment status. A determination as to whether an IPV has occurred shall be based on careful consideration of the particular circumstances. A determination that an IPV has been committed must be based on clear and convincing evidence that there has been a deliberate misrepresentation on the part of the applicant or recipient. Consideration should be given to: (i) whether the correct or unreported information was, in fact, known to the applicant or recipient and (ii) whether the applicant or recipient understood the eligibility and reporting requirements.

C. An individual may be charged with an IPV even if the individual's application for assistance was denied. It is not required that an overpayment actually exist for there to be a determination of IPV.

D. The local agency is required to proceed against any individual alleged to have committed an IPV through an administrative disqualification hearing (ADH).

E. The local agency must coordinate its actions with any corresponding actions being taken against the individual under the Food Stamp Program if the factual issues involved arise out of the same or related circumstances.

F. The local agency shall confer with the appropriate legal authorities to determine the types of cases that will be accepted for prosecution. Cases found to have committed an IPV (i) by a court of appropriate jurisdiction; (ii) pursuant to an administrative disqualification hearing; or (iii) by waiving rights to an administrative disqualification hearing will be referred for prosecution in accordance with the agreement established between the legal authority and the local agency. This agreement shall include information on how and under what circumstances cases will be accepted for possible prosecution and any other criteria set by the prosecutor for accepting cases for possible prosecution, such as minimum amount of overpayment that resulted from the IPV. The local agency is encouraged to refer for prosecution those individuals suspected of committing an IPV where large amounts of overpaid benefits are involved or more than one act of IPV is suspected.

G. An individual found to have committed an IPV (i) by a court of appropriate jurisdiction; (ii) pursuant to an administrative disqualification hearing; or (iii) by waiving his right to an administrative disqualification hearing shall be ineligible to participate in the TANF program for the time periods specified in subsection H of this section.

H. The time periods are as follows:

1. ~~Six~~ Twelve months for the first offense;
2. ~~Twelve~~ Twenty-four months for the second offense; and
3. Permanently for the third offense.

I. The disqualification penalty imposed on an individual in one locality shall be used in determining the appropriate disqualification penalty.

J. The individual found guilty of committing an IPV shall be disqualified. The local agency shall not take the individual's needs into account when determining the assistance unit's need and the amount of assistance. However, any income of the disqualified individual will be considered available to the assistance unit.

K. The period of disqualification shall begin no later than the first day of the second month which follows the date the local agency receives a signed ADH waiver from the recipient or the date of a hearing officer's or court's decision that the recipient is guilty. The disqualification period will be imposed without regard to eligibility or ineligibility of the individual and will run uninterrupted until it expires.

L. The disqualification penalty shall be in addition to, and cannot substitute for, any other sanctions or penalties which may be imposed by law for the same offense.

M. The disqualification penalty cannot substitute for other sanctions under the TANF program.

N. Any period for which a disqualification period is imposed shall remain in effect, without possibility of an administrative stay, unless and until the finding upon which the penalty was based is subsequently reversed by a court of appropriate jurisdiction. In no event shall the duration of the period for which such penalty is imposed be subject to review in a fair hearing.

O. The local agency shall provide all applicants with a written notice of the disqualification penalties for IPV at the time of application.

P. In order to request an ADH, the local agency shall ensure that a prehearing investigation has occurred and that the evidence supports the charge of intentional program violation. There must be clear and convincing evidence which demonstrates the individual committed an IPV.

Q. Prior to submitting the request for an ADH to the state hearing authority, the local agency shall provide written notification to the individual suspected of an intentional program violation that the individual can waive his right to an ADH by signing a waiver request and returning it to the local agency within 10 days from the date notification is sent to the individual in order to avoid submission of the request for an ADH.

R. If a signed waiver is received, no ADH is conducted and the disqualification period is imposed.

S. If a case is referred for an ADH, it shall not be referred for prosecution unless the individual is found to have committed an IPV.

T. The local agency shall request an ADH be scheduled by submitting a written request to the state hearing authority. The form must include the following information:

1. Identifying information;
2. Summary of the allegation or allegations;
3. Summary of the evidence; and
4. Copies of documents supporting the allegation or allegations.

The referral is to be signed and dated by the supervisor or local agency director.

U. The local agency may combine a fair hearing and an ADH into a single hearing if the factual issues arise out of the same or related circumstances provided that the individual receives prior notice of the consolidation.

V. The hearing officer will schedule a date for the ADH and provide written notice to the individual suspected of committing an IPV at least 30 days in advance of the date the ADH has been scheduled. The notice shall contain at a minimum:

1. The date, time, and place of the hearing;
2. The charge(s) against the individual;
3. A summary of the evidence, and how and where the evidence can be examined;
4. A statement that the decision will be based solely on information provided by the department of social services if the individual fails to appear at the hearing;
5. A statement that the individual or representative will, upon receipt of the notice, have 10 days from the date of the scheduled hearing to present good cause for failure to appear in order to receive a new hearing;
6. A statement that a determination of intentional program violation will result in a disqualification period, and a statement of which penalty is applicable to the case scheduled for a hearing;
7. A listing of the individual's rights. The assistance unit or its representative must be given adequate opportunity to:
 - a. Examine the contents of his case file and all documents and records to be used by the agency at the hearing at a reasonable time before the date of the hearing as well as during the hearing;

- b. At his option, present his case himself or with the aid of an authorized representative;
- c. Bring witnesses;
- d. Establish all pertinent facts and circumstances;
- e. Advance any arguments without undue interference;
- f. Question or refute any testimony or evidence, including opportunity to confront and cross-examine adverse witnesses.

8. If there is an individual or organization available that provides free legal representation, the notice shall advise the affected individual of the availability of the service.

W. The time and place of the ADH shall be arranged so that the hearing is accessible to the individual suspected of committing an IPV. The individual may request a postponement of the ADH if the request for postponement is made at least 10 days in advance of the date of the scheduled hearing. The ADH shall not be postponed for more than a total of 30 days and the state hearing authority may limit the number of postponements.

X. The ADH can be held even if the individual fails to appear. The individual has 10 days after the date of the scheduled ADH to present reasons indicating a good cause failure to appear.

Y. Even though the individual is not present, the hearing officer shall carefully consider the evidence and determine if an IPV was committed, based on clear and convincing evidence.

Z. If the household member is found to have committed an IPV but a hearing officer later determines there was good cause for not appearing, the previous decision is no longer valid and a new ADH shall be conducted. The hearing officer who conducted the original hearing may

conduct the new hearing. The good cause decision shall be entered into the hearing record by the hearing officer.

AA. The ADH is attended by persons directly concerned with the issue at hand. This normally means a representative of the local agency and the individual alleged to have committed the IPV.

BB. The hearing officer shall:

1. Identify those present for the record;
2. Advise the individual that he may refuse to answer questions during the hearing and that anything said or signed by the individual concerning the charge or charges may be used against him in a court of law;
3. Explain the purpose of the ADH, the procedure, and how and by whom a decision will be reached and communicated;
4. Consider all relevant issues and determine if an IPV was committed, based on clear and convincing evidence;
5. Request, receive and make part of the record all evidence determined necessary to render a decision;
6. Regulate the conduct and course of the hearing consistent with due process to ensure an orderly hearing; and
7. Advise the local agency to obtain a medical assessment at local agency expense if the hearing officer considers it necessary.

CC. The individual alleged to have committed an IPV shall be given adequate opportunity to:

1. Examine all documents and records to be used at the ADH at a reasonable time prior to the ADH as well as during the ADH. The contents of the case file, including the

application form and documents of verification used by the local agency to establish the alleged IPV, shall be made available;

2. Present his own case or with the aid of an authorized representative;
3. Bring witnesses;
4. Establish all pertinent facts and circumstances;
5. Question or refute any testimony or evidence, including the opportunity to confront and cross-examine witnesses; and
6. Advance arguments without any undue influence.

DD. The hearing officer is responsible for rendering a decision based on clear and convincing evidence from the facts as presented in the hearing. The hearing officer must substantiate his decision by identifying supporting evidence and applicable regulations.

EE. The hearing officer shall prepare a written report of the hearing which shall include findings, conclusions, decisions and appropriate recommendations. The decision shall specify the reasons for the decision, identify the supporting evidence, identify pertinent TANF regulations and respond to reasoned arguments made by the individual or representative.

FF. The hearing officer shall notify the individual of the decision in writing.

GG. If the individual is found guilty of committing an IPV, the written decision shall advise the individual that disqualification shall occur.

HH. The determination of IPV by the hearing officer cannot be reversed by a subsequent fair hearing.

II. Upon receipt of the notice of a decision from the hearing officer finding the individual guilty of an IPV, the local agency shall inform the individual of the reason for the disqualification and the date the disqualification will take effect.