

Issue: Group III Written Notice with 10 day suspension (threatening behavior);  
Hearing Date: 10/21/02; Decision Date: 10/22/02; Agency: DMHMRSAS;  
AHO: David J. Latham, Esq.; Case No. 5542



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5542

Hearing Date: October 21, 2002  
Decision Issued: October 22, 2002

APPEARANCES

Grievant  
Chief of Police for Agency  
Six witnesses 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 appeal from a Group III Written Notice issued for threatening behavior.<sup>1</sup> She received a 10-day suspension as part of the disciplinary action. The Program Manager also recommended that grievant take an anger management course. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup>

The Department of Mental Health, Mental Retardation and Substance Abuse Services (MHMRSAS) (Hereinafter referred to as “agency”) has employed the grievant for nine years. She is employed as a direct service associate (DSA) and has a reputation for providing excellent client care.

The agency has promulgated a policy on workplace violence that defines workplace violence as, “Any physical assault, battery, threatening behavior or verbal abuse occurring in or communicated to the workplace.”<sup>3</sup>

Grievant had been given a Group I Written Notice in January 2002 following a confrontation with another employee. Although the other employee initiated and provoked the incident, grievant responded with a verbal threat against the other employee, saying that, “I’ll see you at [name of a local funeral home].” At the second resolution step, the agency rescinded the disciplinary action but issued in its place a Notice of Improvement Needed/Substandard Performance.<sup>4</sup> The notice counseled grievant that, in the future, she should walk away from any confrontation.

At about 9:00 p.m. on July 7, 2002, a DSA was scheduled to provide treatments to certain clients including one under grievant’s care. He performed the treatments on all but grievant’s client because that client had not yet been bathed. He returned to the ward at about 10:50 p.m. and found that the client had still not been bathed. Following procedure, he notified both his supervisor and the charge nurse. A few minutes later, grievant entered the day hall and confronted the other DSA. She was upset that he had reported to the nurse and yelled at him, stating words to the effect of, “That’s it; I am tired of your stuff. I’m going to hurt you. Just you wait; I’m going to hurt you.”

Three other employees were in the day hall at the time. Two of them heard the verbal exchange but were busy discussing a client and did not remember what she had said. One employee heard grievant threaten the DSA with words essentially similar to those quoted above. That employee does not have a personal relationship either with grievant or with the threatened DSA. Both the threatened DSA and the witness state that grievant repeated her threat

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<sup>1</sup> Exhibit 8. Written Notice issued July 25, 2002.

<sup>2</sup> Exhibit 9. Grievance Form A, filed August 6, 2002.

<sup>3</sup> Exhibit 4. *Workplace Violence* policy, May 23, 2002.

<sup>4</sup> Exhibit 7. Notice of Improvement Needed/Substandard Performance, February 1, 2002.

to hurt the DSA three times. Grievant admitted yelling at the DSA but said she did not remember saying she was going to hurt him.<sup>5</sup>

### 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 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.<sup>6</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management 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

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<sup>5</sup> Exhibit 2. Agency police department *Offense Report*, July 13, 2002. See also Exhibit 3, grievant's written statement, undated.

<sup>6</sup> § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*.

provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally warrants removal from employment. One example of a Group III offense is threatening or coercing persons associated with any state agency, including employees.<sup>7</sup>

Although grievant says she cannot remember threatening the other DSA, the agency has demonstrated, by a preponderance of evidence that grievant did make a verbal threat. The written statement of the threatened DSA corroborates the sworn testimony of the witness who testified at the hearing.<sup>8</sup> The police investigative report is consistent with the written statement and the sworn testimony. Thus, the weight of the evidence makes it more likely than not that grievant did verbally threaten to hurt another employee.

Grievant infers that the other DSA and the witness who heard her statement were good friends, and that the witness is lying to help the other DSA. The hearing officer finds this theory to be not credible for two reasons. First, the incident unfolded very quickly and was promptly reported. Therefore, there was no opportunity for the other DSA and the witness to prepare a coordinated story. Their versions of the event are consistent with each other. Second, the witness' testimony was direct, credible and unshaken by grievant's accusation of collusion during cross-examination.

Grievant contends that she should not be disciplined because she had previously requested a transfer to another part of the facility where she would not be working with the other DSA. She believes that the other DSA had been telling lies about her and that this was a factor in what occurred on July 7, 2002. Her supervisor had been receptive to the possibility of a transfer but had told grievant that staffing limitations prevented transferring her at the time she made the request.

Verbally threatening an employee is a Group III offense. Both state and agency policies provide for the termination of employment for such an offense. In this case, the grievant's reputation for excellent client care persuaded the agency that she deserves one more opportunity to continue working – providing she learns to control her anger and cease making verbal threats against others. Given the totality of the circumstances in this case, the discipline given by the agency is reasonable and appropriate.

### DECISION

The disciplinary action of the agency is affirmed.

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<sup>7</sup> Exhibit 6. Section V.B.3.k, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

<sup>8</sup> The threatened DSA resigned from employment soon after this incident, in part because he felt unsafe with grievant in the workplace.

The Group III Written Notice for threatening behavior issued on July 25, 2002 is hereby UPHELD. The Written Notice shall remain in the grievant's personnel file for the length of time specified in Section VII.B.2.c of the Standards of Conduct.

### 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.
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.

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.<sup>9</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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<sup>9</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

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David J. Latham, Esq.  
Hearing Officer