

Issue: Group III Written Notice with termination (violating safety rules and threatening another employee); Hearing Date: 02/22/07; Decision Issued: 02/26/07; Agency: UMW; AHO: David J. Latham, Esq.; Case No. 8522; Outcome: Employee granted full relief; **Administrative Review: HO Reconsideration Request received 03/07/07; HO Reconsideration Decision issued 03/13/07; Outcome: Original decision affirmed; Request to appeal to Circuit Court received 03/21/07; EDR Ruling #2007-1613 issued 04/05/07; Outcome: permission granted; Judicial Review: Appealed to Circuit Court, Fredericksburg, on 04/11/07; Outcome pending.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8522

Hearing Date: February 22, 2007  
Decision Issued: February 26, 2007

**APPEARANCES**

Grievant  
Two representatives for Grievant  
Four witnesses for Grievant  
Chief of Police  
Two Attorneys for Agency  
Five witnesses for Agency

**ISSUES**

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Did the agency comply with applicable law and policy?

## FINDINGS OF FACT

Grievant filed a timely grievance from a Group III Written Notice issued for violating safety rules where there is a threat of physical harm, and for threatening or coercing persons associated with a state agency.<sup>1</sup> As part of the disciplinary action, grievant was removed from state employment effective November 9, 2006. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup> University of Mary Washington (Hereinafter referred to as "agency") has employed grievant as a police officer for 13 years.

The agency's police department has promulgated General Rules of Conduct which provide that police officers are to "...maintain courageous calm in the face of danger, scorn or ridicule; develop self-restraint; and be constantly mindful of the welfare of others."<sup>3</sup> The policy also provides that, "Employees of the Department will at all times be civil and courteous. They will maintain an even disposition and remain calm, regardless of provocation, in executing their duties."<sup>4</sup>

Grievant had left work early on October 20, 2006 to see his physician because of high blood pressure. He volunteered that he would bring in a physician's excuse to cover his absence. On October 26, 2006, the lieutenant noticed grievant outside his office at the photocopy machine and asked grievant for a copy of the physician's excuse. Grievant became argumentative and asked why the lieutenant needed the note at that time. The lieutenant asked grievant if he had the excuse with him. When grievant responded affirmatively, the lieutenant asked grievant to just make a copy while he was at the copy machine. Grievant then complied with the request. When the lieutenant left his office a few minutes later and walked past grievant's desk, grievant was rocking back and forth repeating, "He's pushing me, he's pushing me."

Grievant then went to the police Chief's office. The chief observed that grievant was visibly upset, shaking, red-faced, and was speaking rapidly in a loud, high-pitched voice complaining that the lieutenant had harassed him by asking for a copy of the physician's excuse. Grievant said he "didn't want it to come to blows" with the lieutenant. The chief forcefully told grievant that it would not come to blows in his department. Grievant demanded leave to see a psychiatrist because he was "having trouble sleeping and having homicidal thoughts."<sup>5</sup> The chief immediately told grievant that because of his statements, he was relieving grievant from duty. He asked grievant for his firearm and badge and sent him home.

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<sup>1</sup> Agency Exhibit 1. Group III Written Notice, issued November 9, 2006.

<sup>2</sup> Agency Exhibit 8. Grievance Form A, filed August 8, 2006.

<sup>3</sup> Agency Exhibit 2. Section 3, Operations Manual Number 1.09, *General Rules of Conduct*, July 1, 2004.

<sup>4</sup> Agency Exhibit 2. Section 4.3.4.3, *Id.*

<sup>5</sup> Agency Exhibit 6. Chief's notes of events on October 26, 2006. See also Agency Exhibit 7, Interview notes taken by Employee Relations Analyst, October 30, 2006.

The agency had known for some time that grievant was taking blood pressure medication. In the summer of 2006, grievant had told the chief of police that he was having bad thoughts. The chief told grievant to take two weeks of leave to address his stress problems. Grievant had to leave the worksite on October 20, 2006 because his blood pressure was elevated. The chief of police had noticed that grievant's demeanor had been changing in recent months and that small things seemed to bother grievant. On October 26, 2006, when grievant asked the chief for leave time to see a psychiatrist, the chief felt that grievant was not in control of himself. Other employees had also observed a change in grievant's behavior during the fall of 2006. One coworker related that in September or October 2006, grievant had said (about the lieutenant), "He's pushing me, he's pushing me. I may not be responsible for what I do. I'm a trained killer." The same coworker observed that grievant became angry about trivial matters and took things too personally. On October 11, 2006, grievant met with the employee relations analyst, told her about his "bad thoughts" dreams, and said it was not smart to anger someone with his training and access (to weapons)." The analyst concluded that grievant has an anger management problem that needs to be addressed. A supervisor had talked with grievant in early October and understood from their discussion that grievant wanted to harm himself and was emotionally stressed. Grievant told the supervisor, "I don't know what I'm capable of."

#### 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. In all other actions the employee must present his evidence first and must prove his claim by a preponderance of the evidence.<sup>6</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 promulgated *Standards of Conduct* Policy No. 1.60. 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. 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>7</sup> Violating safety rules where is a threat of physical harm, and threatening employees of a state agency are Group III offenses.

The agency has failed to demonstrate that grievant violated any specific safety rule but grievant's statements on October 26, 2006 when considered in the full context of events could be construed as an implied threat to do harm to the lieutenant. This would constitute a Group III offense.

However, the grievant has raised the issue of his physical and emotional status at the time of termination. The agency was aware from as early as the summer of 2006 that grievant was experiencing stress problems. The stress increased during the fall of 2006 resulting in increased blood pressure, inappropriate remarks to others, frequent agitation at trivial matters, and culminated on October 26, 2006 with his "homicidal thoughts" statement to the police chief. Thus, the agency knew that grievant was experiencing a serious health condition for which he was receiving continuing treatment by a health care provider (blood pressure medication and monitoring).

The Family and Medical Leave Act (FMLA) entitles any eligible employee suffering from a serious health condition that renders him unable to perform the functions of his position to 12 weeks of leave during any twelve-month period. It is undisputed that grievant is eligible for FMLA and that the agency is covered by FMLA. Grievant is entitled to leave under FMLA because he had a serious health condition that required continuing care by a health care provider. When his firearm and badge were taken away, grievant became unable to perform the functions of his position. The agency prevented grievant from utilizing FMLA benefits when it terminated his employment. An employee need not specifically request FMLA leave as long as he provides the employer "notice of a probable

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<sup>6</sup> § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

<sup>7</sup> Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

basis for FMLA leave.”<sup>8</sup> An employer is obligated to provide medical leave even though an employee has failed even to say he is sick – for example, when circumstances provide the employer with sufficient notice of the need for medical leave.<sup>9</sup> *Byrne* holds that an employee may be excusing from making a specific request where his medical condition (e.g., clinical depression) prevents him from communicating the nature of his illness and the resulting need for medical leave.

In the instant case, however, grievant specifically requested that he be allowed to see a psychiatrist because of his “homicidal thoughts.” Given the clear notice to the employer and grievant’s request to be allowed to see a psychiatrist, the FMLA imposes a duty on the employer to conduct further investigation and inquiry to determine whether the proposed leave qualifies as FMLA leave.<sup>10</sup> When considered in the context of the months leading up to October 2006, grievant’s request and his declaration of homicidal thoughts were clearly indicative of a serious health and/or emotional condition. The agency’s decision to terminate grievant’s employment constitutes interference with grievant’s right to pursue his FMLA benefits.

### DECISION

The disciplinary action of the agency is reversed.

The Group III Written Notice and removal from employment are **RESCINDED**. Grievant is reinstated to his former position or, if occupied, to an objectively similar position. Grievant is awarded full back pay, and benefits and seniority are restored. The award of back pay must be offset by any interim earnings, and by any unemployment compensation received.

If agency inquiry determines that grievant’s condition is still such that he should receive FMLA leave, he should be afforded the necessary leave in order to fully assess his physical condition and evaluate his emotional condition.

### APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this 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.

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<sup>8</sup> *Collins v. NTN-Bower Corp.*, 272 F.3d 1006, 1008 (7<sup>th</sup> Cir. 2001).

<sup>9</sup> *See Byrne v. Avon Prods, Inc.*, 328 F.3d 379, 381-82 (7<sup>th</sup> Cir. 2003).

<sup>10</sup> *See Aubuchon v. Knauf Fiberglass, GMBH*, 359 F.3d 953 (7<sup>th</sup> Cir. 2004)

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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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>11</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>12</sup> You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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]

*S/David J. Latham*

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<sup>11</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>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

David J. Latham, Esq.  
Hearing Officer





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

**DIVISION OF HEARINGS**

**RECONSIDERATION DECISION OF HEARING OFFICER**

In re:

Case No: 8522-R

Hearing Date:	February 22, 2007
Decision Issued:	February 26, 2007
Reconsideration Request Received:	March 7, 2007
Response to Reconsideration:	March 13, 2007

**APPLICABLE LAW**

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.<sup>13</sup>

**OPINION**

The agency requests reconsideration of the decision because it believes that the Findings of Fact portion of the decision contains an error of fact. Specifically, the agency contends that grievant demanded leave to see a psychiatrist in the summer of 2006 rather than on October 26, 2006.

The chief of police's testimony at hearing did not specifically mention grievant's demand to see a "psychiatrist." The chief testified that, during the summer of 2006, he had offered grievant leave time to seek medical help. The human relations analyst did not testify about this issue. In sum, the evidence as to when grievant made his statement is somewhat unclear. The agency asserts that because the analyst's note

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<sup>13</sup> § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

about the psychiatrist is located below the phrase “a few months ago -,” that phrase must mean that the demand to see a psychiatrist was made in the summer rather than in October. However, this interpretation ignores the fact that the analyst scratched through another statement that immediately follows the “a few months ago -” phrase. That statement – “Charlie complained about being moved” is followed by a blank line and then by the statement about the psychiatrist. Thus, it is unclear without testimony from the analyst on this point, whether the “a few months ago -” phrase was meant to apply to both statements or, only to the complaint-about-moving statement.

Nonetheless, assuming *arguendo*, that the agency’s interpretation is the correct one, that change would not alter the decision in this case. If anything, it reinforces the view that the agency had a duty, perhaps as early as the summer, to determine whether grievant should be provided FMLA leave for what was clearly a serious health and/or emotional issue. When grievant came to the chief’s office on October 26, 2006, he was “agitated, shaking, red-faced, and speaking loudly and quickly.” He complained angrily about the lieutenant and expressed “homicidal thoughts”. While the chief acted correctly when he disarmed grievant and removed him from duty, the agency should have recognized that grievant was in need of, at the least, professional counseling assistance. The agency should have placed grievant on FMLA leave and assisted him by directing him to the appropriate resources to obtain help for a problem that he was not capable of dealing with at that time.

### Conclusion

While grievant’s request for help in seeking assistance from a psychiatrist was given some weight in this decision, the *date on which the request was made* was not given a lot of weight. The facts given heaviest weight were grievant’s assertion that he was having homicidal thoughts combined with his physical behavior when he made that assertion. Whether his request to see a psychiatrist occurred in the summer or on October 26, 2006 is of relatively little significance.

### DECISION

The agency has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered the agency’s argument and concludes that there is no basis to change the Decision issued on February 26, 2007.

### APPEAL RIGHTS

A hearing officer’s original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.<sup>14</sup>

*S/ David J. Latham*

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David J. Latham, Esq.  
Hearing Officer

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<sup>14</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).