

Issue: Immediate Termination (threatening another employee); Hearing Date: January 10, 2002; Decision Date: January 11, 2002; Agency: University of Virginia Medical Center; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5345



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5345

Hearing Date: January 10, 2002
Decision Issued: January 11, 2002

PROCEDURAL HISTORY

On November 1, 2001, Grievant was terminated for serious misconduct under University Policy 701. Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 12, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 10, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Urologist Specialist
Registered Nurse
Patient Care Assistant
Operating Room Support Manager
Head Nurse

ISSUE

Whether Grievant should be removed from employment.

BURDEN OF PROOF

The burden of proof is on the University to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. 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 University of Virginia Medical Center employed Grievant for approximately 12 years until his removal on November 1, 2001. Grievant had worked in several different sections of the Center. He has just returned to a section of the Center where he had worked approximately two years earlier. Grievant had worked with Mr. B. and the two had been friends.

On October 29, 2001, Grievant was sitting in a chair and working on a desk top computer. Mr. B. observed Grievant from a distance and recognized Grievant as a friend who had returned to work in Mr. B.'s area. Mr. B. walked towards Grievant at an angle but in front of Grievant. As he approached Grievant, Mr. B. extended his arm and placed his hand on top of Grievant's head and lightly patted his head. Grievant was wearing a small cap covering part of his head. Mr. B. smiled and said "welcome back brother". Grievant loudly responded with words to the effect of "Don't put your hands on my head." Mr. B. backed up and said, "Man, I'm sorry." Grievant continued to complain to Mr. B. and Mr. B. responded, "You're taking this too serious" and then he apologized again. Mr. B. apologized a third time. The apologies had little effect on Grievant and he continued to complain loudly to Mr. B. Curse words were exchanged between the parties. Another employee realized that the conversation was getting out of hand, and she told Grievant and Mr. B. to leave the room. Mr. B. walked into another room and Grievant followed close behind. When Mr. B. turned around, Grievant had a pen-size knife with a one and a half inch blade displayed and pointed towards Mr. B. As Mr. B. observed the knife, Grievant said, "see, you should be dead." Mr. B. was startled by the knife and did not know if Grievant was joking or if Grievant intended to harm him with the knife. Grievant then walked away. Shortly thereafter, Grievant's supervisor asked him about what had happened. Grievant told her he did not threaten Mr. B. with a knife but rather was carrying scissors. Grievant also said that if he caught Mr. B. outside he "would whip his ass."

CONCLUSIONS OF LAW

University Policy 701 sets forth “Employee Rights and Responsibilities.” The primary purpose of this policy “is to facilitate the well-being of all members of our community by defining and establishing certain norms of behavior for employees and management.” Employees engaging in “serious misconduct” under the policy may be terminated without prior counseling. Serious misconduct includes, “[t]hreatening a Medical Center employee, patient or visitor with physical harm.”

When Grievant displayed a knife, pointed it at Mr. B., and said “see, you should be dead”, Grievant threatened another employee. His behavior constituted serious misconduct under the Policy 701 thereby justifying his termination.

Grievant contends he has the right to defend himself and that had Mr. B. not improperly touched him, none of the subsequent events would have occurred. The Hearing Officer agrees that Grievant had the right to defend himself, as would any person who was being attacked. Mr. B., however, did not attack Grievant. Although Mr. B. should not have placed his hand on Grievant’s head, his action could not be construed as attacking Grievant. Once Mr. B. placed his hand on Grievant’s head, Grievant should have simply expressed his objection and let the matter drop. This is especially true given Mr. B.’s repeated apologies.

Grievant contends that because the criminal charges were dropped against him, the incident was not one that should warrant removal. The Hearing Officer disagrees. Mr. B. did not wish to pursue charges against Grievant. The Commonwealth’s Attorney likely relied on Mr. B.’s preference in deciding against prosecuting Grievant.

DECISION

For the reasons stated herein, the Grievant’s removal from employment is **upheld**.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. 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.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar days** of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

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

1. The 10 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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer