

BEFORE THE IMPARTIAL HEARING OFFICER

In the Matter of the Grievance of
CHRISTOPHER HOWARD
Under the Grievance Procedure of
SHOREWOOD SCHOOL DISTRICT

Case 66
No. 72882
MM-6491

DECISION NO. 34988

Appearances:

Craig Johnson, Attorney, Sweet & Associates, 2510 East Capitol Drive, Milwaukee, Wisconsin, 53211, appearing on behalf of Mr. Howard.

Gary Ruesch, Attorney, Buelow Vetter Buikema Olson & Vliet, Attorneys at Law, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin, 53186, appearing on behalf of the District.

DECISION OF THE IMPARTIAL HEARING OFFICER

On March 5, 2014, the Shorewood School District filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint Raleigh Jones, a member of its staff, to serve as the Impartial Hearing Officer in a proceeding involving the termination of employee Christopher Howard. Mr. Howard was represented by Attorney Craig Johnson as noted above. Prior to the hearing, the parties submitted a record to the IHO, along with their position statements. A hearing was conducted on March 19, 2014 in the offices of the Shorewood School District, Shorewood, Wisconsin. The hearing was not transcribed. Having considered the evidence, the arguments of the parties and the record as a whole, I issue the following decision.

PROCEDURAL BACKGROUND

Christopher Howard was employed by the District as a maintenance employee for about 31 years. He was discharged on September 27, 2013.

Howard grieved his discharge pursuant to the District's grievance procedure.

In Stage 3 of that procedure, an unresolved grievance can be appealed to an Impartial Hearing Officer (IHO) who is to render a written decision. Either side can then appeal the IHO's decision to the School Board. Stuart Levitan was selected by the District as the IHO for the Stage 3 appeal. He held a hearing on the matter on January 16, 2014. On January 27, 2014, IHO Levitan issued a decision in the matter. While his findings will be identified in detail below, it suffices to say here that Levitan recommended that Howard's termination be vacated. Levitan supplemented his January 27 decision with a 17 page written decision dated February 2, 2014. The District appealed Levitan's decision to the School Board. On February 14, 2014, the School Board issued a written decision wherein they rejected the IHO's conclusion, and found that Howard's termination was appropriate.

Howard then appealed the School Board's decision to Stage 4 of the District's grievance procedure. Stage 4 of that procedure essentially repeats Stage 3 of the District's grievance procedure. Specifically, it allows a grievant to go to a second IHO, who is to render a second decision. Either side can then appeal that (second) IHO decision to the School Board. The Board's decision is final.

Raleigh Jones was selected by the District as the IHO for the Stage 4 appeal. Jones held a hearing on the matter on March 19, 2014.

THE LEVITAN DECISION

In the Discussion section of his decision, Levitan addressed the "six enumerated considerations" which the District's grievance procedure directs the IHO to address (at Stage 3).

After doing so, he reached the following ultimate conclusions:

IHO FINDINGS AND DOCUMENTATION OF DECISION

- (i) The evidence supports a reasonable inference that the grievant did in fact engage in an act or omission contrary to the District's work rules, standards or expectations that he knew or should have known of, as follows:
 - (a) His comments to a female student on September 11, 2013 were unwelcome and had the effect of interfering with her educational experience, and were of a personal rather than professional nature, and thus violated sections 411.1 and 528 of the Employee Handbook, respectively;
 - (b) His failure to be candid and forthright during the investigation constituted a

violation of section 522 of the Employee Handbook.

- (ii) In light of the District's educational mission, its adopted policy of Progressive Discipline, the grievant's 31-year employment by the district, the absence of relevant discipline in the record, the fact that his comments to the student were not predatory or knowingly harassing, and the general duties and responsibilities of his position, the maximum appropriate level of discipline would have been a suspension of not more than four weeks. Therefore, the termination recommendation imposed pursuant to the administrator's decision did not bear a reasonable relationship to the seriousness of the conduct.

Accordingly, it is my Decision to Vacate the termination recommendation.

THE PARTIES' POSITIONS

Howard asks me to adopt Levitan's findings and conclusions. He notes that when the District decided on a penalty, it chose the penalty often characterized as "industrial capital punishment" (i.e. discharge). He contends that given his "largely unblemished 31-year record of employment" with the District, that level of punishment – for his alleged misconduct – was excessive under the circumstances. He asks me to vacate the discharge.

The District asks me to reject Levitan's findings and conclusion, and uphold Howard's termination. The District notes what precipitated Howard's discharge was this: Howard was offended by how a female student was dressed. He then made a number of comments to the student about how she was dressed. His statements to her constituted harassment. He then followed the student into a school building, which freaked her out. The student then reported the incident to school authorities. When Howard was subsequently questioned about his conduct toward the student, he was untruthful and denied doing any of the foregoing. He should have instead been honest about his actions. The District contends that all of the foregoing conduct constituted misconduct which violated Board policies 411.1, 522 and 528. According to the District, that misconduct warranted discharge. The District asks me to give deference to the Superintendent's decision to discharge Howard.

DISCUSSION

This case has a unique procedural history. Prior to my involvement in this matter, this grievance had already been before an IHO. He held a hearing and issued a written decision. He overturned the discharge. The IHO's decision was then appealed to the School Board, which

overturned the IHO's decision. Under the District's grievance procedure, a grievance can then be appealed to a second IHO. Thus, each side essentially gets another bite at the proverbial apple. I am the second IHO. After I issue my decision herein, it can be appealed – again – to the School Board. Per Act 10, the School Board will then make the final decision on the grievance.

As already noted, one of the things that make this case so procedurally unique is that another IHO has already issued a decision which decided the merits of this grievance. What the parties got from the first IHO was a fully developed 17-page, single-spaced decision. Therein, the IHO addressed the determinative facts as well as the parties' arguments relative to same, and then he reached his ultimate findings on the merits of Howard's discharge. Since the parties got a lengthy reasoned decision from IHO Levitan, it seems to me that the logical starting point is to address what the parties are going to get from me in my decision.

What the parties are going to get from me is an answer to this question: Do I concur with, or reject, the two ultimate findings which Levitan made on the last page of his decision.

Before I answer that question, I'm going to make the following comment. I don't agree with every single statement Levitan made in his decision. If the roles here were reversed, and I was the one who had written the first IHO decision which was then being reviewed by a second IHO, I speculate that any IHO might say something to the effect of they didn't agree with everything I wrote in my decision either. That's the nature of writing independent decisions. While I disagree with portions of Levitan's decision, I see no compelling reason to opine about what I would have written differently from Levitan. As I see it, I don't have to do that to reach a decision herein.

With that caveat noted, I will now answer the question of whether I concur with, or reject, the two ultimate findings which Levitan made on the last page of his decision. The two ultimate findings which he made can fairly be stated as follows: that Howard committed misconduct for which he could be disciplined, but that the punishment of discharge was not warranted under the circumstances.

I concur with those two ultimate findings. My rationale follows.

I'm going to start by reviewing the verbal exchange that Howard had with a female student on September 11, 2013. That day, while outside the high school building, Howard encountered a female student walking on the sidewalk. She was wearing shorts and a sleeveless top. Based on what happened next, it can be inferred that Howard disapproved of how the student was dressed, and he decided to chastise the student for how she was dressed. He first asked the student her name and grade, and she answered his questions. Howard then (allegedly) told the student she was attractive, and asked her why she was "showing so much skin to these white boys." The student didn't respond to either of Howard's (alleged) statements, and walked away from him. In doing so, she walked into the school building. Howard then followed the student into the building. Howard's (alleged) comments and actions (i.e. following her into the building) made the student uncomfortable, so she went to a teacher and reported her concerns. Later, the student made a written statement about the incident.

District officials quickly determined that the person whom the student complained about was Howard. When they subsequently questioned Howard about his interactions with the female student on September 11, Howard admitted that he had asked the female student her name and grade. He denied telling the student that she was attractive, and also denied asking the student why she was “showing so much skin to these white boys.” He also admitted to following the student into the building.

While Howard denied making the two statements attributed to him by the student, I find that he made them. Here’s why. Shortly after Howard had the verbal exchange with the female student in question, Howard had a short conversation with a campus aide. In that conversation, Howard asked the campus aide what the student dress code was. Then he said to the campus aide: “I don’t know why these young black women want to show so much skin to the white boys here.” That statement is remarkably similar to the one that the student contends Howard made to her. Their similarities persuade me that Howard made the statements that the student attributed to him.

Howard’s actions toward the student were problematic for the following reasons. First, it would be one thing if the student knew Howard, and Howard had previously offered her his comments and advice. However, that was not the case, and the student didn’t know Howard at all. In fact, she didn’t even know that Howard was a District employee. Insofar as the record shows, Howard and the student had not previously had any interactions of any kind. Second, it is in that context – where the student didn’t know Howard from Adam, so to speak – that Howard made his unsolicited comments to the student. Once again, it would be one thing if Howard had chosen to make a comment about something completely innocuous such as the weather. He didn’t do that though. Instead, he chose to comment on her physical appearance and dress. He chose poorly. Even if Howard disapproved of how the student was dressed, and all he meant to do was offer her what he considered to be sage, paternal advice, his good intentions in that regard didn’t carry the day. Instead, what matters is what Howard said, and how his comments were received by the student. It’s clear from her written statement to District officials that she (i.e. the student) considered Howard’s comments to her about her appearance and dress to be unwelcomed, unsolicited and offensive. That was her call to make. Building on that, it’s easy to see why she felt harassed by Howard’s comments to her. Third, when Howard followed the student into the school building, that freaked out the student. Even if it was just a coincidence that Howard was going into the school building at exactly the same time as the student, the student was concerned for her personal safety. Under the circumstances – where Howard had just harassed her with unsolicited comments about her appearance and dress – her concern had a legitimate and understandable basis.

Howard subsequently made his situation worse when he was questioned by District officials about the incident with the student. What I am referring to is this: when Howard was questioned about the incident, he was untruthful in some of his responses. Specifically, he denied telling the student she was attractive, and he denied asking the student why she was showing so much skin. Since Howard did, in fact, make these statements, he should have admitted to doing so. By being untruthful about it though, he compounded his problems. That’s because it gave the

District a legitimate basis to question his veracity (along with his inappropriate verbal exchange with the student).

I therefore find that Howard did what he was charged with doing, to wit: he made inappropriate unsolicited comments to a female student about her appearance and attire, and subsequently did not answer truthfully when he was asked about his comments to the student. That was workplace misconduct for which he could be disciplined.

* * *

The focus now turns to the level of discipline which the District imposed on Howard for that misconduct. The District decided that the misconduct warranted discharge.

I've decided to begin this part of my discussion with the following comments about discharge cases in general. One common reason that employees are discharged is that they have an extensive disciplinary history with an employer. Another common reason that employees are discharged is that they commit one of the so-called capital or cardinal violations. The typical discipline for committing a violation of that type is immediate discharge.

Having made those preliminary comments about discharge cases in general, I'm now going to apply those principles to the facts of this case.

First, sometimes at discharge hearings, an employee's entire disciplinary history is offered as an exhibit. That didn't happen here (at least it didn't happen at the second IHO hearing). Instead, what happened was this: the District's counsel averred that Howard had some discipline in his work record, but he did not identify what it was or when it occurred. In response to that, Howard's counsel averred that Howard had a relatively clean work record. That's it; that's all I've got to work with regarding Howard's disciplinary history. The inference which I'm drawing from the statements noted is that Howard did not have an extensive disciplinary history with the District. I'm further drawing the inference that Howard did not have any previous discipline for misconduct that was of the same type and nature as he committed here. The reason I made that inference is because if Howard had previously been disciplined for, say, making inappropriate statements to students, or harassing students, or not being truthful, I'm sure the District would have told me about it. The reason that the foregoing is noteworthy, of course, is because arbitrators routinely review an employee's disciplinary record when reviewing the punishment which an employer has meted out to an employee.

Second, since the District discharged an employee who had a relatively clean disciplinary record, it's apparent that the District considered Howard's misconduct to be so egregious that it amounted to a capital offense (also known as a cardinal offense). Some common capital offenses that warrant immediate termination are theft, physical attacks, willful and serious safety breaches, gross insubordination and significant violations of law on the employer's premises. Howard's misconduct does not shoe-horn easily into any of the categories of capital offenses just noted. Therefore, it behooved the District to show how and why Howard's misconduct should be considered a capital/cardinal offense. It could have done that by showing evidence of other

discharge cases where the facts did not fit easily into any of the capital offenses noted above, but that an employee with a relatively clean disciplinary record was nevertheless fired. However, it did not do that. That being so, there is no objective basis in the record that supports the District's conclusion that Howard's misconduct qualifies as a capital/cardinal offense justifying immediate discharge. Additionally, I'm persuaded that Howard did not know – when he committed his misconduct – that the Employer considered that misconduct to be a capital offense that would result in his discharge. While the District asserted in the first IHO case that the reason it had to fire Howard immediately was because it could not “run the risk that he [Howard] would repeat either the inappropriate comment or dishonesty he displayed in this situation” (Levitan Dec. at p.16), Levitan found that the record did not support “that any such risk exists.” Ibid. I concur. I'll explain why in the next paragraph.

Third, one of the central tenets of progressive discipline is that the discipline which is meted out must bear some reasonable relation to the seriousness and frequency of the offense. Howard's misconduct qualifies as serious. While I'm not minimizing his misconduct, one of the things about it that makes it noteworthy – from a progressive discipline perspective – is that Howard had never committed an offense like this before. Again, insofar as the record shows, this was the first and only time he committed this type of offense. While I'm normally hesitant to make predictions about future employee behavior, it's my view that Howard learned a very hard lesson from his experience in this matter and will not repeat it.

When the foregoing factors are considered together with his longevity with the District (i.e. 31 years of service), they militate against the punishment of discharge. I therefore conclude that the punishment of discharge was not commensurate to the misconduct committed. The Employer had the burden of showing that the punishment it meted out was not excessive, and I find it did not meet that burden.

Stage 4 of the District's grievance procedure mandates that I make express findings of fact as to:

1. Whether the evidence supports a reasonable inference that the grievant did in fact engage in an act or omission that is contrary to the District's work rules, standards, or expectations that were known to the grievant or should have been known by a reasonable employee in the grievant's position, and
2. Whether the termination recommendation imposed pursuant to the decision of the district administrator or designee bears a reasonable relationship to the seriousness of the alleged conduct in light of the District's educational mission.

Pursuant to that directive, I hereby make the following express findings of fact:

1. That the evidence supports a reasonable inference that the grievant did in fact engage in an act or omission that is contrary to the District's work rules, standards, or expectations that were known to the grievant or should have been known by a reasonable employee in the grievant's position; and
2. That the grievant's termination by the District Administrator did not bear a reasonable relationship to the grievant's misconduct.

Finally, Stage 4 of the District's grievance procedure mandates that I issue a decision that:

[Either] – upholds the termination in all aspects;

[Or] – vacates the termination action thereby rendering it void from the outset.

Based on the rationale expressed above, I pick the second option, meaning I recommend that Howard's termination be vacated.

In so finding, it is noted that the first IHO recommended a four week suspension for Howard. I concur.

Dated at Madison, Wisconsin, this 6th day of May 2014

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones, Impartial Hearing Officer