

BEFORE THE IMPARTIAL HEARING OFFICER

In the Matter of the Grievance of

JORDAN JACOBI

Under the Grievance Procedure of

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT

Case 341
No. 71959
MM-6434

DECISION NO. 37460

Appearances:

Mr. Craig R. Johnson, Attorney at Law, Sweet and Associates, LLC., 2510 East Capitol Drive, Milwaukee, Wisconsin 53211, appeared on behalf of Mr. Jacobi and Milwaukee District Council 48, AFSCME.

Mr. Joseph Ganzer, Staff Attorney, Milwaukee Metropolitan Sewerage District, 260 West Seeboth Street, Milwaukee, Wisconsin 53204, appeared on behalf of the District.

DECISION OF THE IMPARTIAL HEARING OFFICER

On January 28, 2013 the Milwaukee Metropolitan Sewerage District filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of its staff, to serve as the Impartial Hearing Officer in a proceeding involving the termination of employee Jordan Jacobi.. Mr. Jacobi is represented by Milwaukee District Council 48, and by counsel, as noted above. A hearing was conducted on April 18, 2013, in the administrative offices of the Milwaukee Metropolitan Sewerage District. No formal record was taken.

At the conclusion of the evidentiary hearing the parties made closing argument, and the record was closed.

ISSUE

The employer maintains a handbook, with a provision governing employee discipline and

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provision outlining a grievance procedure. The grievance procedure under which this matter proceeds provides the following:

The sole issue before the hearing officer shall be: Based on the evidence presented, is the written decision of the Division Director, or designee, arbitrary and capricious.

BACKGROUND AND FACTS

Jordan Jacobi, the grievant, has been employed by the Milwaukee Metropolitan Sewerage District (MMSD) since approximately July 2010. Mr. Jacobi worked as a Monitoring/ Sampling Technician. Technicians work in 3-person teams collecting water samples from confined spaces (i.e. manholes). Each person on the team has a role. The entrant is the person who enters the manhole, wearing protective equipment. The attendant monitors the work of the entrant and maintains ongoing contact with the entrant. The third crew member has miscellaneous assignments and must be prepared to enter the confined space and/or to rescue the entrant.

Mr. Jacobi was terminated from his employment on December 11, 2012 for allegedly threatening a co-worker on December 5, 2012. In determining to discharge the grievant, the District considered other incidents in the grievant's work history.

On January 12, 2012 Kevin Shaefer, the Executive Director of the MMSD was conducting a "coffee with Kevin" session with certain employees of the District. The purpose of the session is to allow employees to talk directly with the Executive Director. The conversation turned to Act 10, or the financial consequences of Act 10. All parties acknowledge that the topic is difficult and that the atmosphere surrounding the conversation was heated. At some point the conversation became circular, with the same question fetching the same answer. Shaefer indicated that "...this is silly..." in reference to the circular nature of the discussion, which he felt was no longer accomplishing anything. Jacobi replied "...there is nothing silly about messing with people's lives..." Jacobi did not regard his comment as hostile, and felt it was a part of the give and take the session was designed to promote. Other observers reported his behavior as sudden, belligerent and sarcastic. It was regarded by some as hostile and disrespectful to the Executive Director.

Chris Schultz is the Water Quality Senior Project Manager (Department Head). The matter was brought to his attention, and he met with Jacobi. Following the conversation Jacobi apologized for the remark. Schultz defended Jacobi, noting that "Jordan is a fine, productive employee that I would stand behind. While I understand his actions and demeanor may have appeared less than respectful, it's unrealistic for anyone to expect a positive atmosphere at these meetings."

There was no discipline issued relative to the comments made during the January 12 meeting.

On October 26, 2012 a group of employees and supervisors were discussing certain proposed work rule changes relative to overtime. At some point in the discussion employee

Amy Prausa suggested taking a vote. The discussion continued, and about 5 minutes later Prausa repeated her suggestion that the group take a vote. In response, Jacobi called out: "...and you should shut the hell up." Prausa was shocked and offended. The two supervisors present, Dave Wozniak and Kurt Spieker called Jacobi into their office immediately after the meeting and told Jacobi that there was no call for that kind of remark and that he needed to treat others with more respect. Jacobi went to Prausa and apologized.

Jacobi had a quarterly appraisal on November 28, 2012. He was told his work was very good, but that he needed to control his tongue. He said he would work on it.

The events that triggered the discharge occurred on December 5, 2012. The work day for the Monitoring/Sampling Technicians begins at 6:30 A.M. and ends at 2:30 P.M., at which time employees are released to shower and change. There is a morning shape up where the Technicians are assigned work for the day. On the morning of December 5, Kurt Spieker was identifying employees who were available and willing to work a future overtime assignment. He needed 4 people. He called out four names, three of whom accepted the assignment, one of whom declined. As Spieker was wrapping up the overtime item, Jacobi pointed out that he had not lined up all four employees. Tanya Gregg, a co-worker, corrected Jacobi, indicating that he had secured all four. Spieker reviewed his notes, realized he needed another employee, and secured a fourth employee for the overtime. At that point a number of people, including Gregg and Spieker, left the room to begin work.

There is a dispute of fact as to what occurred next. According to Amy Prausa, an eye witness, Jacobi declared, in a loud voice: "I just want to punch that girl, right in the teeth." Jacobi denies making any such comment. Three other witnesses to the event testified that there was no such comment made. Richard Czerwinski could recall no distinguishing comments being made. He heard no threats, nor any reference to a punch. James Dropik heard nothing unusual. Maureen Campbell could not recall any reference to a punch in the face.

Employees return to the shop from their work day between 2:00 – 2:30 P.M. The afternoon of December 5, a conversation ensued over certain raises member(s) of management had received. It was the testimony of Tanya Gregg that around 2:25 someone had a document that showed certain pay grade raises. She went over and glanced at the sheet and then returned to where she had been standing. It was her testimony that Jordan Jacobi arrived, looked at the paper and began yelling and pacing back and forth toward her and then away. She testified that he was angry and swearing. She testified that he said "you don't know fuc_ing everything, you roll your eyes..." The "roll your eyes" remark was alleged to have been repeated several times. She testified that she indicated that she didn't know what he was talking about.

Prausa was present during the exchange that occurred in the afternoon. She testified that Jordan was upset. She indicated that Tanya said the pay plan was no big deal.. Her testimony

was that Jordan was loud, used the F-word, and indicated that “you roll your F...ing eyes all the time, correct us all the time...” Prausa testified that Jacobi was in Gregg’s face.

Jacobi testified that he was upset by Gregg’s comment that the pay was no big deal. He indicated that he told her to stay out of the conversation and told her to butt out. Jacobi testified that Gregg rolled her eyes in response and that he did say something to the effect of her rolling her eyes was bullsh_t, isn’t that right Rich. This was directed at Czerwinski, who was already in his truck. Jacobi denied threatening Gregg. Jacobi testified that everyone left the area. He walked to his car and bent over the open trunk. He testified that while there, and with no one around he said to himself something to the effect: “I wish someone would knock her block off.” Jacobi testified that there was no one around or within earshot when he made his remark.

Richard Czerwinski testified as to the events of the afternoon. Czerwinski testified that while he was present Gregg and Jordan were just talking. There was no profanity, no argument, no shouting. When he left, he was unaware there was an incident.

James Dropik testified. According to Dropik, Tanya and Jordan went back and forth but the conversation never got heated. He did observe that it ratcheted up. He could not recall whether there was profanity. He became a little alarmed and felt he should get away from the conversation and head to his car. He did so because it “... didn’t sound that good...I’ll get away from it.”

Maureen Campbell testified as to what she observed on the afternoon of December 5. She observed Jordan pointing at Gregg and heard him make a remark about eyeball roller, which he repeated. Campbell did not hear a threat or any profanity. She testified that Jacobi raised his voice but did not hear much of the conversation. She testified that Gregg did not appear to be upset. Afterward she talked with Tanya and told her not to listen to him.

At 2:30 the employees are free to head to the shower. Gregg went to her locker. Prausa approached her in the locker room and recounted the same version of the morning events that she testified to in this proceeding. Prausa indicated that Gregg was upset and in tears. She also advised Gregg that she needed to tell management what had happened. Gregg testified that she was worried about what Jacobi would do next. She waited until 2:55 and went to see Spieker, who directed her to write up her complaint. She prepared and submitted the following:

December 5, 2012

Kurt Spieker
Monitoring Supervisor
Milwaukee Metropolitan Sewerage District

RE: Verbal attack and bullying behavior from Jordan Jacobi,

Mr. Spieker,

On December 5, 2012 while at the 13th Street Milwaukee Metropolitan Sewerage District (MMSD) property I was verbally attacked and was notified of bullying behavior towards me from Mr. Jordan Jacobi on MMSD.

According to Ms. Amy Prausa, at approximately 0640 this morning after I left the morning assignment meeting Mr. Jacobi made several comments to her and other MMSD employees in the room. The employees in the room included: Amy Prausa, Jim Dropik, Ryan Bates, Maureen Cambell, Matt Kulinski, Richard Czerwinski, Daniel Sell, Son Dinh, and Art Goff. He waited until Dave Wozniak, Kurt Spieker, and I were out of the room to make the following comments. According to Amy Prausa Mr. Jacobi stated, "I hate that girl....she's always rolling her eyes""I just want to get up and punch her in the face."

At approximately 1425 this afternoon I was in the garage waiting to depart. The employees were discussing pay raises from non-union representatives. I was not involved in the conversation and was quietly standing there waiting to leave. Mr. Jacobi verbally attacked me in front of Jim Dropik, Ryan Bates, Maureen Cambell, Richard Czerwinski, Art Goff, and Amy Prausa.

Mr. Jacobi stated, "Look at Tanya, she doesn't care (about the Manager raises) she's going to be one someday." I said, "No, I was thinking about the Sustainability and how Sustainability employees tend to make a lot of money." Mr. Jacobi yelled, "Ohh bullsh\$\$\$. You think you know everything." "All you do is stand there and roll your eyes thinking your better than us." I said, "Jordan, I don't know what you're talking about I never roll my eyes." Mr. Jacobi yelled, "You roll your eyes all the time, you correct us all the time. Ask Rich?" I know Mr. Rich Czerwinski may have said something; however, he was in a MMSD truck and did not say anything to me. Please realize that these were the only direct quotes that I can remember. He swore several times and was making verbally aggressive comments. So much that one of the employee, Maureen Cambell said to me, "Don't worry about what Jordan says, he doesn't know anything."

I did not find out about his morning bullying words or threatening behavior until I returned to my locker room at 1430. It was at this time that Ms. Amy Prausa told me about this morning's comment to "punch me." I feel that this behavior is inappropriate for a work environment and he should not have stated that he felt like he wanted to "punch me" most of the Monitoring and Sampling Technicians in the department. I would appreciate it if you addressed my concerns with Human Resources and Mr. Jordan Jacobi..

Regards,

Tanya Gregg
Monitoring/Sampling Technician

The next morning, December 6, the grievant reported to Kurt Spiekers' office. According to Spieker, Jordan came in to his office and asked if he was going to be fired. Spieker testified that Jordan then said: "I would never hit a woman, but I would hit her." Spieker testified that he told Jordan to stop, and to say no more.

Jacobi denied making the hit a woman comment to Spieker.

Upon receipt of the complaint the employer conducted an investigation. The investigation consisted of interviews of a number of people who were present during the described events. The witnesses identified in this proceeding were all interviewed, as were others. An investigatory hearing was held on Thursday, December 6. The grievant was given a notice of suspension on Friday, December 7, effective Monday, December 10. The suspension letter set forth the essence of the complaint, and the conclusion that the grievant had violated the zero-tolerance policy towards threats and violence in the workplace. It indicated that the investigation would continue and that further discipline was possible.

On December 11, 2012 the District terminated Jacobi by written letter. A grievance was filed on December 14. The grievance was denied by the following letter:

December 21, 2012

Mr. Jordan Jacobi

...

RE: Response to Grievance of Termination

Dear Mr. Jacobi:

I received your grievance (refer to Exhibit A) dated Friday, February 14, 2012. Upon reviewing the grievance form and the information that was available at the time of the suspension and termination, it is clear that the incident referred to on December 5, 2012 was one in a pattern of progressively unacceptable behavior you exhibited, in violation of the District's Work Rules (refer to Exhibit B). Therefore your termination will be upheld.

The District received a formal complaint (refer to Exhibit C) on the afternoon of Wednesday, December 5, 2012 alleging that you were involved in a number of incidents that day perceived as abusive, threatening, and inappropriate. In response, investigatory meetings were conducted on Thursday, December 6, 2012 to determine if these incidents constituted a violation of the District's Work Rules and Zero Tolerance Policy (refer to Exhibit B). Your testimony during the

investigatory meeting, although inconsistent with the testimony of other witnesses to these events, admitted your use of profanity directed at a coworker, and your assertion that she needed her “teeth knocked out”.

The ultimate decision to suspend and subsequently terminate your employment was not based solely on the December 5, 2012 incident. Prior events, increasing in frequency and severity by the end of 2012, also played a role. For instance when Executive Director Kevin Shafer visited the S. 13th Street Facility on January 12, 2012, a number of sources reported to me that your language and demeanor while addressing him had been perceived as inappropriate and disrespectful. I spoke to you regarding your behavior on January 16, 2012 (refer to Exhibit D). You admitted your penchant for sarcasm and stated that you hoped no one would hold this against you. However, this incident was the first of many.

At a group meeting of the Field Monitoring Department held at the S. 13th Street Facility on the morning of October 26, 2012 you publicly berated another District employee telling her she should “Shut the hell up” (refer to Exhibit E). Your supervisors spoke to you regarding your behavior and you subsequently apologized to the employee. A number of weeks prior to this incident you had a similar inappropriate outburst, directed at no individual in particular, after which you approached your supervisors and apologized for your behavior.

Your supervisors spoke to you on November 28, 2012 regarding your past inappropriate comments to others and stating that you must control your tongue (refer to Exhibit E). You have not demonstrated an ability to do so. This series of events, highlighted by the December 5, 2012 indirect threat of physical violence, has led up to what has been deemed a violation of the District’s Zero Tolerance Policy. Therefore my decision is to uphold your termination.

Sincerely,

Christopher Schultz
Water Quality Senior Project Manager

In 2004 Kevin Shafer issued a memo, referenced in Schultz’s letter, which established a zero-tolerance policy toward workplace violence. Relevant portions of that memo provided:

DATE: July 8, 2004

TO: All District Employees
(Represented and Non-Represented)

FROM: Kevin L. Shafer, P.E.
Executive Director

SUBJECT: “Zero-Tolerance” Policy Toward Threats
And Violence In The Workplace

One quality of a healthy organization is a workforce where individual employees conduct themselves in a mature and respectful manner toward one another. It is important for the District to achieve and maintain such an environment. Certain types of conduct are so at odds with this goal that they cannot be tolerated under any circumstance. Violent, threatening, and abusive conduct falls squarely within this class of intolerable offenses. Such conduct significantly disrupts employee peace of mind and effectiveness; most importantly, it compromises employee safety.

The District has work rules applicable to represented employees that prohibit fighting on the job, harassing and threatening other employees, and assaulting or committing a battery against another employee. Some of these offenses (fighting, harassing, and threatening other employees) are classified presently as “major offenses” – that is, an employee potentially could engage in this highly disruptive and inexcusable conduct three times before he or she would be terminated. Others (assault, battery) are classified as “intolerable offenses”, for which termination of employment is to result.

Effective with the distribution date of this memorandum, the District is adopting a “zero-tolerance” policy toward all conduct of a violent or abusive nature in the workplace. This means that violence, threats of violence, and abusive harassment (which can provoke violence) will not be tolerated, and that persons who engage in such conduct will be terminated. As of this date, District management will treat any of the following offenses (whether committed by a represented or non-represented employee) as intolerable:

- A. Threatening another or member of the public with physical violence, or making a general statement of an intent to commit a violent act in the workplace. Such statements have no place in the workplace and will not be tolerated even if claimed to have been made in jest.

...

- E. Harassing another employee, contractor, or contractor’s employee, where such action interferes with the person’s ability to adequately perform his or her job or subjects him or her to a demeaning or hostile environment, harassing a member of the public. Harassment includes discriminatory harassment on the basis of age, race, sex, religion, national origin, disability, sexual orientation, and any other protected characteristic; it also includes other forms

of harassment such as the malicious teasing or insulting of others, or the playing of abusive, offensive, or demeaning pranks upon others.

- F. Unreasonably provoking or instigating any of the conduct prohibited above.

Any employee who witnesses conduct that violates any of these standards is required to report the matter immediately to a District supervisor or manager so that prompt intervention can occur. District management will report violations or suspected violations of this rule to the police as appropriate.

To the extent previously existing work rules are inconsistent with any of the above; such existing rules are repealed and replaced by the above.

This new policy does not create a difficult standard of conduct: it requires only that employees conform to the simplest and most basic standards of mature, civilized behavior.

The District has provided in-service training to its employees on the topic of harassment. The grievant has attended such training.

DISCUSSION

The written decision of the Division Director is the December 21, 2012 letter denying the grievance and upholding the termination. The question posed in this proceeding is whether or not that letter and decision is arbitrary and capricious.

It is the view of the grievant and the Union that the decision of the district is arbitrary and capricious because the weight of the credible evidence was ignored. By that standard there was neither a threat nor any violence. The Union notes that the grievant had no previous discipline and that there should have been a more progressive and graduated approach to discipline.

In its decision to terminate the grievant, the District went through a process and arrived at a conclusion.

The Process

The first recorded instance of the employer counseling the grievant on his propensity to speak in ways that cause others to take offense occurred following the January 12, 2012 exchange with Shaefer. The event was brought to Schultz attention. He did not seek it out. Schultz defended Jacobi, pointing out that the atmosphere was not good and that Jacobi was a good employee.

Jacobi's "shut the hell up" remark on October 26 offended Prausa, a co-worker and

bargaining unit member, and Spieker, a supervisor. Spieker counseled Jacobi about the offensive nature of his remarks. A month later Spieker further counseled Jacobi about controlling his tongue, and once again drew the distinction between his mouth and his work.

The employer credits Prausa's version of the "...punch that girl..." remark, alleged to have been made on the morning of December 5. Jacobi denied making the remark in the group setting, but did indicate that later in the day he went to his truck, and under circumstances where no one was around or within hearing range, made a remark about knocking her block off.

There was some indication at hearing that the matter was first brought to the attention of management by Jacobi in the post incident investigation. That is not possible. Both Prausa's actions in informing Gregg of the remark and Gregg's complaint letter pre-date the investigation. Neither is it possible that Jacobi's private comments at the trunk of his car form the basis for Prausa's claim. The remarks were allegedly uttered at a time when Prausa was with Gregg and they were allegedly made under circumstances where no one could hear them.

This alleged remark resurfaced the next morning in the exchange between Jacobi and Spieker.

The employer was left to make a determination as to whether the remark was made. It chose to credit Prausa and Spieker, and to discredit a number of others. Nothing in the record suggests that the decision to find that the remarks were made was arbitrary, capricious or otherwise without a basis in fact. I think the record supports a finding that the District was analytical in its assessment of the evidence.

As to the events of the afternoon of December 5, both Prausa and Gregg characterized Jacobi's behavior as angry, swearing and confrontational. Dropik testified on behalf of Jacobi but indicated that he felt that he should get away from the exchange because "...it didn't sound good." Similarly, Campbell testified on behalf of Jacobi, and while she didn't hear anything of a troubling nature she did subsequently comfort Gregg and told her not to listen to Jacobi.

The employer credited the testimony of Prausa and Gregg. That testimony is admittedly at odds with other testimony. Nothing in the record suggests that the District's credibility assessments lacked good faith. It appears the District engaged in a search for the truth. Some of the contrary testimony suggests that something out of the ordinary occurred. Whatever was said prompted Dropik to feel a need to leave and Campbell to comfort Gregg.

Once a complaint was filed, the District promptly interviewed all potential eye witnesses. It also took care to gather the facts and to reconcile disputed facts before acting.

I believe the employer provided a good deal of process. That conclusion is not really in dispute in this proceeding. The parties disagree over the weight of the credible evidence. That has been addressed above. It is also the view of the Union that the grievant was entitled to progressive discipline. Inherent in that contention is the claim that the District behaves in an arbitrary and capricious manner if it does not provide progressive discipline.

I do not regard that to be the case. Here, the grievant was put on notice that his confrontational and disturbing outbursts were not appropriate to the workplace. He was warned on January 12, October 26, and November 28, 2012. He acknowledged as much. He was provided an opportunity to hear the charges arising from December 5, and respond. His denials and defense were heard and considered. I do not believe that third party imposition of a progressive system of discipline is consistent with an arbitrary and capricious standard of review.

The Conclusion

The employer has a zero tolerance policy relative to threats and violence in the workplace. Under that policy threats of physical violence or a statement indicating an intent to commit a violent act in the workplace are not tolerated and subject the aggressor to termination. The policy has been in effect since 2004.

Gregg testified that she was upset and scared over the December 5 afternoon exchange. She took the matter seriously. Prausa testified that she was shaken by Jacobi's October 26 comments. She testified that she feared Jacobi couldn't work with her.

Campbell testified that while she would trust Jacobi as a co-worker, she felt Gregg might have an issue of trust.

The District enforced its zero-tolerance policy relative to violence by terminating the grievant. That is the discipline called for by the policy. I do not regard the work rule as arbitrary. It is at least noteworthy that every woman who testified expressed the view that there was at least a perceived concern about Jacobi as a trusted co-worker.

I do not believe the termination for violation of the policy relating to violence in the workplace was either arbitrary or capricious.

Dated at Madison, Wisconsin, this 16th day of May, 2013

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

William C. Houlihan /s/

William C. Houlihan, Impartial Hearing Officer