

**IN THE MATTER OF THE IMPARTIAL HEARING OFFICER REVIEW OF THE
GRIEVANCE OF CHRISTOPHER HOWARD**

Case 65
No. 72867
M-4150

DECISION NO. 34699

Appearances:

Impartial Hearing Officer: Atty. Stuart D. Levitan, Wisconsin Employment Relations Commission, 4868 High Crossing Blvd., Madison WI.

For the Grievant: Atty. Craig R. Johnson and Atty. John M. Loomis, Sweet and Associates, LLC, 2510 E. Capitol Drive, Milwaukee, WI, with Malou Noth, Staff Representative, AFSCME.

For the Employer: Atty. Sarah Platt, Von Breisen and Roper, S.C., 411 E. Wisconsin Ave., Milwaukee, WI, with Shorewood School District Superintendent Martin Lexmond, Ed. D.

Pursuant to the School District of Shorewood Employee Handbook dated August 28, 2012, this is an Impartial Hearing Officer review of the termination of Christopher Howard.

Relevant Provisions in Employee Handbook

EMPLOYMENT PRACTICES AND PROCEDURES

Progressive Discipline Process

The School District of Shorewood subscribes to a progressive discipline process. Discipline may result when an employee's actions fall short of generally accepted standards of professional behavior, violates a policy or rule, when an employee's performance is not acceptable or the employee's conduct is detrimental to the interests of the District. Typically, disciplinary action will follow a progression of these four (4) steps: verbal warning, written warning, suspension with or without pay and termination of employment. Specific disciplinary actions will depend on the behavior and frequency of occurrences. Serious employee behaviors may lead to

suspension or termination without following progressive discipline steps. The District reserves the right to impose disciplinary action as may be appropriate in particular circumstances. *(Remainder of this paragraph relates to teachers/certified staff, and is not applicable to this matter)*

411.1 STUDENT HARRASSMENT

The Board of Education is committed to creating an environment that treats all students with dignity and respect, provides students with a safe and supportive learning environment, and promotes respect, tolerance and cooperation throughout the District. The Board expects all members of the school community to help create and maintain this environment. Accordingly, harassment of students, including sexual harassment, by other students, employees or volunteers is prohibited.

Harassment may be defined as verbal or physical conduct that has the purpose or effect of creating an intimidating, hostile or offensive learning environment or interfering with the student's educational experience. Harassment may include, but is not limited to, conduct relating to a student's sex, race, religion, national origin, ancestry, orientation or physical, mental, emotional or learning disability.

Sexual harassment like other forms of harassment and bullying undermines the integrity of the District. All students must be allowed to function in an environment free from unsolicited and unwelcome sexual overtures and advances. Sexual harassment refers to behavior that is gender based or sexually orientated, is unwelcome, is personally offensive, debilitates morale and, therefore, interferes with a safe, secure and respectful learning environment for all students and other members of the school organization. Sexual harassment can manifest itself in conduct such as:

- gender-based or sexually oriented verbal "kidding" or abuse;
- subtle pressure for sexual activity;
- physical contact such as touching, pinching or constant brushing against another's body; or
- demands for sexual favors whether or not accompanied by implied or overt promises of preferential treatment or threats.

The conduct identified above is not intended and should not be construed as an exhaustive or comprehensive listing of conduct / behavior that may be deemed sexual harassment by the District.

Any student who believes he / she has been the subject of prohibited harassment shall report the matter in accordance with the District's student discrimination complaint procedure (411 policy, guideline and exhibits, Equal Educational Opportunities). If the alleged harasser is the person to whom the complaint would normally be reported, the harassment complaint should be reported to the next administrative authority listed in the complaint procedures. All student harassment reports and complaints shall be taken seriously and investigated in a timely manner. Retaliation in any form against any student for filing a complaint or participating in any investigation of alleged harassment is prohibited.

The Board shall not tolerate any conduct that fails to comply with the letter and spirit of this policy. Disciplinary measures up to and including employee discharge or student suspension / expulsion may be imposed for a violation of this policy. If Administration believes that the alleged harassment constitutes criminal conduct it may notify law enforcement authorities as it deems appropriate in accordance with District procedures.

443.1 STUDENT DRESS

The Board of Education believes that a student dress code is an important part of creating a school environment that is safe, conducive to learning and free from disruption.

...

1. Students shall dress appropriately for the school environment. Student attire that causes, or is likely to cause, a material interference with school operations or a substantial disruption to the school environment will not be permitted. School staff shall consider the link between the potential disruption or interference and the student's attire at issue when making decisions under this provision.

....

School staff shall be responsible for enforcing student dress code standards on a fair and consistent basis. If there is a disagreement between staff and students and/or their parents/guardians regarding the appropriateness of a student's attire, the building principal has the authority to make this decision and determine the actions that will be taken to deal with the matter.

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EMPLOYEE CONDUCT

The District expects its employees to do quality work, maintain confidentially [*sic*], work efficiently, and exhibit a professional, courteous and respectful attitude toward other employees, parents, students and community members.

The District also expects employees to:

1. Comply with all applicable work rules, job descriptions, terms of the *Employee Handbook* and legal obligations; and
2. Comply with the standards of conduct set out in the Board policies and guidelines, the *Employee Handbook*, and with any other policies and guidelines that impose duties, requirements or standards attendant to their status as District employees.

Violation of any policies or guidelines may result in disciplinary action, up to and including discharge. Disciplinary actions shall be carried out in accordance with established District procedures.

Some infractions have implications beyond the employment relationship between the District and an individual employee, and the District may inform local, state, and federal officials of such conduct. Included among the behaviors covered by this policy are violations of applicable law, “immoral conduct” that could result in revocation of an individual’s licensure through the Wisconsin Department of Public Instruction, and any other actions that the District deems pertinent.

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EMPLOYEE – STUDENT RELATIONS

All District personnel shall recognize and respect the rights of students, as established by local, state, federal law, and by Board policies. As such, employees must, at all times, maintain a professional relationship and exhibit a professional demeanor in their interactions with students. Furthermore, employees shall refrain from engaging in any verbal or physical conduct of a sexual nature directed toward a student, including, but not limited to, sexual advances, activities involving sexual innuendo, or requests for sexual favors or sexually-explicit language or conversation. Employees shall not form inappropriate social or romantic relationships with students, regardless of

whether or not the student is 18 years old. Employees must not use profane or obscene language or gestures in the workplace, whether or not students are present.

BACKGROUND

This grievance concerns the disciplinary termination of Christopher Howard, a custodian for the Shorewood School District for approximately 31 years until his discharge on September 27, 2013.¹

On September 11, at about 9:30 a.m., Howard encountered a female student, A.B. (not her real initials) as they were heading into the North Gym. Both Howard and A.B. are African-American. Howard was wearing a dark t-shirt with the logo "Gift of Hope;" she was wearing shorts and a sleeveless top, an outfit which was not particularly modest, but which would not have caused a "material interference" with school activities. Howard initiated some exchanges with the student, who did not recognize him as a District employee. He followed her into the building, stopping a few feet in as she continued down the corridor.

As Howard turned and left the building, B. went directly to inform Physical Education teacher Vince Peterson of the encounter, and gave the following handwritten statement:

Older black gentleman walked up to me and asked my name and age. I just told him I was a Senior. He told me I was a very attractive young woman ... Actually he asked did I go to church. I said no. Then he said that he felt very comfortable telling me this, then he asked why I was showing so much skin for all these white boys. I didn't reply. He followed me into the north gym but stopped by the radiator. I went and told Peety. (Peterson).

Peterson promptly contacted High School Principal Tim Kenney, who directed campus aide Brandon Hemphill to look for the person while Peterson contacted the

¹ Unless otherwise specified, all dates herein are 2013.

Shorewood Police Department. Within a few minutes, Hemphill saw Howard and asked if he had seen anyone out of the ordinary on campus. Howard asked Hemphill what the student dress code was, and remarked, "I don't know why these young black women want to show so much skin to the white boys around here." Hemphill then noted that Howard matched the description the student had given (which included that he was wearing a black t-shirt with a logo relating to "Hope" or "Faith"), and realized he was the person who had spoken to the student. Hemphill excused himself from the conversation and went to inform Principal Kenney.

At about 11:00 a.m., Howard filled out an Absence Report and took a half-days' sick leave. He later explained he had been feeling dizzy and unwell. ²

On September 12, Kenney and Human Resources Coordinator and School Board Secretary Kim Grady, individually or together, interviewed the student, Hemphill, Peterson and a custodial colleague of Howard's. On September 13, Grady interviewed Howard, who was accompanied by AFSCME Staff Representative Malou Noth. According to notes taken by district employee Tabia Nicholas, the following exchanges took place:

Q: Did you talk to a student on Wednesday?

A: Well I don't know. I often talk to students; I am an ambassador around here. I talk to students all the time telling them "stay encouraged, stay focused." Was it a guy or a girl? Hmm ... I talked to two students that day. I talked to a guy (Brandon) and I talked to this young lady, she came out the door where we met on the sidewalk and I said "Hello, young lady" and I asked her name and I asked her if she was a Senior she said yes. I told her "that's good - stay focused, you can do this!" She turned toward the gym and I turned toward the gym and said "thank you for listening to me" and then I walked south to my truck.

Q: Did you go into the building behind her?

A: No, I only went as far as the door then walked to my truck.

Q: We have a student who claims you approached her and asked her personal questions. Did you ask her:

- a. What is your name? *Yes*
- b. How old are you? *No but I asked her her grade*

² The District has not accused Howard of abusing sick leave .

- c. Do you go to church? *No ... maybe yes I probably did – it's all real fuzzy. I can't say, I wasn't feeling well.*
- d. Why do you show so much skin for all/to these white boys? Or, I don't understand why you are showing all these white boys all your stuff (or maybe skin) *No*

Q: Did you make the following statements to her: I feel comfortable saying this to you (because you are a black woman); you are very attractive young woman?

No

Q: Would it be appropriate for you or anyone to say those things to a student?

No, absolutely not she's just a girl. I would never say that to any young lady it is inappropriate.

Q: Did you follow the student into the building?

No, we walked down the sidewalk and I turned to the door and thanked her. If I did I didn't go far. I was discombobulated.

Q: On the same day at approx. the same time, did you asked Brandon, an SHS aide, what the dress code was for SHS?

No.

Q: Did you make the comment to Brandon that, "I don't know why these young black women want to show so much skin to these white boys here"?

No, our conversation was 20 seconds long and not specific. I was wondering what my limitations are and I said something like "I am concerned about some of these kids." I told him I speak with kids.

Q: What do you mean by limitations?

I feel comfortable talking to guys and its' a new school year and I thought he was part of the admin. Team.

Q: What were you wearing on Wednesday? Did you wear your ID? Are you supposed to?

Blue jeans, black tennis shoes – dog tags – ID – dark blue polo- hat – sunglasses.

Q: Are you sure you wore your ID?

Yes

Q: Are you always supposed to wear your ID?

Yes. I was on my back working on the water fountain so I might have removed the stuff around my neck and I left my phone and tools lying out next to me. This talk here is all unacceptable to me. I didn't say anything in appropriate. I didn't touch nobody. Trust me. Total conversation time with both parties wasn't more than 2 minutes.

On September 27, 2013, Superintendent Martin Lexmond, Ed. D., terminated Howard for his comments and for his conduct during the district's investigation into the incident. Pursuant to the district's Employee Handbook, Howard grieved the termination on October 3; following a Stage 1 interview on October 15, Lexmond upheld the termination, writing to Howard on October 31 as follows:

This letter communicates the documentation of, and the findings related to, a review of the grievance appeal you filed related to your termination stemming from work-related incidents that occurred on September 11, 2013.

In accordance with the School District of Shorewood Employee Handbook – Section 4: Employment Practices and Procedures, page 30, this letter communicates the Stage 1 grievance process has been completed. This process included the required interview of you, the grievant, and other individuals that I determined had relevant information related to the events of September 11, 2013. I also included in the Stage 1 process a review of all investigation notes and interview notes as well as pertinent records.

The facts shared during the interviews of individuals I determined had relevant information in this case and the review of investigation notes and interviews indicate the following:

1. You made inappropriate comments to a female student and behaved in such a manner towards her that you were in violation of the Employee Handbook expectation that "A physically and emotionally safe environment is essential for learning to occur."
2. Your behavior towards the female student violated board policies 411.1 Student Harassment, 522 Employee Conduct and 528 – Employee – Student Relations.
3. You were dishonest in reporting facts of the September 11, 2013 incident during investigations into this matter. You denied

making statements to the students (sic) regarding her appearance, and you denied making similar statements to a District employee. You denied following the student into a building and later in the investigation interviews admitted following her by stating "If I did, I did not go far."

4. You were not completely forthcoming in reporting facts of the September 11, 2013 incident when you stated during investigations into this matter that you left work on September 11, 2013 because you were ill but did not indicate you were ill to any employee you spoke with when you completed the paperwork before leaving work that day not did you report your illness to your supervisor.

Because the facts of the stage 1 grievance process indicate that you acted in a manner that cannot be tolerated, your termination is upheld in all respects.

On November 6, AFSCME Staff Representative Malou Noth requested review of the termination by an Impartial Hearing Officer (IHO) or by the Shorewood School Board. On November 25, Noth and Lexmond executed an agreement regarding the implementation of the grievance process in this matter. On December 3, the District contacted the undersigned to determine availability to serve as the IHO in this matter. On December 4 and December 12, respectively, the District and Grievant provided statements setting forth their respective positions regarding the proper disposition of the grievance. On January 16, 2014, the undersigned met with the parties, who presented their respective cases.

DISCUSSION

The Shorewood School District Employee Handbook directs me to review the grievance record giving regard to six enumerated considerations, giving such regard to each "as is due under the unique facts and circumstances of each case." I do so as follows: ³

Whether the district administrator or designee made a reasonable inquiry into the underlying facts and circumstances in an effort to determine whether 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.

³ To facilitate presentation of the discussion, I have rearranged the order of the considerations.

District officials certainly made a reasonable inquiry into the underlying facts and circumstances. They took a statement from and interviewed the student, the teacher she first contacted, the aide who encountered Howard, and other personnel. They twice interviewed the grievant. They reviewed the student's disciplinary and academic record. They viewed security camera video of the encounter. The inquiry which Kenney and Grady undertook satisfied this standard.

Whether the district administrator or designee's inquiry was fair.

There is neither allegation nor evidence that the district's inquiry was anything other than fair. The inquiry satisfied this standard.

Whether the decision of the district administrator or designee appears, on its face, to be unlawfully discriminatory or retaliatory.

There is neither allegation nor evidence that that the administrator's decision was in any way discriminatory or retaliatory.

Whether the evidence/information considered by the district administrator or designee 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.

There are three elements to this factor. Did Howard commit the acts as alleged? Were those acts contrary to the District's rules, standards or expectations? Should Howard or a reasonable employee similarly situated have known the conduct was prohibited?

Based on the students' contemporaneous oral and written statement, and the similar comment as reported by Hemphill, I find Howard did make the comment as reported. Based on that conclusion, and the notes from the investigative interviews, I find that Howard was less than truthful during the investigation.

I further find that Howard's comments interfered with the student's educational experience, and thus were contrary to sec. 411.1. – Student Harassment. I also find Howard did not reflect “a professional, courteous and respectful attitude” toward the young woman, and thus violated sec. 522 - Employee Conduct. I further find that Howard did not “maintain a professional relationship and exhibit a professional demeanor” in his interaction with the student, and thus violated sec. 528 – Employee-Student Relations. I further find that sec. 522 requires an employee to be truthful at all times.

Finally, a reasonable employee in Howard's position should have known not to make unsolicited comments to a female student about her looks and attire, and to answer honestly when asked about doing so.

Whether the grievant could reasonably be expected to have knowledge of and understand the probable consequences of the alleged act/omissions giving rise to the grieved termination recommendation.

This element asks whether Howard could reasonably have been expected to know that he would be fired for his comments to AB and his conduct during the investigation. This is one of the two ultimate questions in this review.

Howard could reasonably have been expected to know that making those comments, and especially denying he had made them, would subject him to some form of discipline. The District has the right to demand that its employees act appropriately towards students and honestly with supervisors, and to impose discipline when the employees fail either standard. The Employee Handbook establishes standards of conduct which employees must honor.

The Employee Handbook also establishes the standard of conduct which the employer must honor when imposing discipline. In Sec. 4, the Handbook explicitly adopts a Progressive Discipline Process, which establishes that discipline "typically" follows a four-step process of verbal warning, written warning, suspension with or without pay and termination.

The District correctly notes that the handbook also provides that "(s)erious employee behaviors may lead to suspension or termination without following progressive discipline steps," and reserves to the District "the right to impose disciplinary action as may be appropriate in particular circumstances." ⁴ Nothing in this decision impairs the employer's right to skip the warning steps and suspend or discharge when there are "serious employee behaviors."

However, the section also effectively defines "serious employee behaviors" by providing that "(s)erious disciplinary actions will depend on the behavior and frequency of occurrences." Thus, it is necessary that I evaluate Howard's specific behavior, and the frequency with which such purported misconduct had occurred.

⁴ The Handbook also sets standards for the termination of certified staff, not here at issue.

The latter aspect is answered easily – there is no evidence in the record Howard had ever been accused of making inappropriate comments to a student or lying during an investigation. This eliminates one of the bases for imposing serious discipline.

Assessing Howard’s behavior requires a more complex analysis, taking various perspectives. As noted above, the District asserts Howard violated three specific sections of the Employee Handbook in his comments to the student.

At section 411.1, the Handbook addresses two forms of Student Harassment - general, and sexual. The District contends Howard’s comments were “language that created an unsafe learning environment and were sexually suggestive,” and thus violated both aspects.

Certainly, from the student’s perspective, Howard’s comments were unwelcome, offensive and unsettling. As such, they had “the effect of ... interfering with the student’s educational experience,” contrary to the mandate of the second paragraph of this section. The comments were also gender-based and implicitly sexual, implicating the third paragraph of this section as well.

Harassment, whether general or sexual, is a serious matter, and I commend the District for its commitment to providing an educational setting that is free of all harassment. Bullying and sexual harassment are scourges of society, and it is critical that schools take the lead in their elimination, as the Shorewood School District has here done.

The Handbook takes harassment seriously. Section 411.1 is the only section at issue in this matter which references both federal law (the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Rehabilitation Act of 1973 and the Americans With Disabilities Act of 1990) and the Wisconsin Administrative Code. Because of the seriousness of an allegation of harassment, especially sexual harassment, the handbook requires that any student “who believes he/she has been the subject of prohibited harassment *shall* report the matter in accordance with the District’s student discrimination complaint procedure (411 policy, guideline and exhibits, Equal Educational Opportunities).” (*emphasis added*). The Handbook also establishes that if the alleged harasser is the person to whom complaints would normally be reported, “the harassment complaint” should be reported to the next administrative authority “listen in the complaint procedures.” The Handbook thus explicitly establishes that there is a formalized complaint procedure, and that it is a necessary first step in the operation of section 411.1.

But that step was not taken in this case. The student’s oral and written statements certainly constituted a legitimate report of the incident, and formed the basis for my

finding that Howard violated this section and sections 522 and 528. But the student's statements did not comply with the District's formal "student discrimination complaint procedure" as required by the Handbook.

Due to the seriousness of an allegation of general or sexual harassment, and the potential implication for federal and state involvement, the District has established a formal student discrimination complaint procedure. That procedure was not followed in this instance. Because that complaint procedure is a necessary and integral component to enforcement of section 411.1, the District cannot discipline Howard at this time under that section.

I turn now to considering whether Howard could reasonably have understood that his violations of sections 522 and 528 were so serious that they would have the probable consequence of his termination in light of the Progressive Discipline Process to which the District subscribes. In doing so, I must understand both the student's perceptions, and Howard's intentions, during their encounter that morning last fall.

It is crucial that at the time of their encounter, A.B. did not know Howard was a district employee. The District responds by noting that the student is familiar with non-employees being present because the high school is an "open campus," so that her concerns were about the content of Howard's comments, not the identity of the person making comments.

It is clear from the investigation, however, that her concerns were largely, albeit not exclusively, about campus security, rather than violations of sections 411, 522 or 528. According to the District's notes, she initially told Peterson "we need a closed campus," and told Lexmond that her initial reaction to the encounter with Howard was "we need to up security" on campus. And according to Hemphill's statement, "she said it freaked her out because he followed her into the North Gym." Indeed, the District was so concerned about the presence of an unauthorized male with bad intent that it immediately contacted the Shorewood Police Department.⁵

Obviously, if the student had realized Howard was an employee, she would not have "freaked out" about Howard entering the North Gym, or told Peterson they needed to close the campus. I agree with the District that even if A.B. had recognized Howard as a District employee, she would still have been fully justified in being offended and upset by his comments, and may very well have commented or complained to a teacher about them.

⁵ This well-meaning but unnecessary step itself intensified the security concern.

However, it is clear from her contemporaneous statements that she was more concerned about the source of the comments rather than the comments themselves.

It is also important to attempt to understand Howard's intent in making his comments. While his motive does not change the fact that AB found them offensive, nor have anything to do with whether the comments violated sections 411, 522 or 528, it is a legitimate part of establishing whether or not Howard could reasonably expect to be fired for making those comments.

The un rebutted record evidence indicates that Howard is active in his church, where he holds a leadership position. Indeed, he was wearing a religiously themed t-shirt on the day in question, and even prefaced his comment by asking A.B. if she went to church herself.

It is clear to me that Howard did not make his comment with predatory or salacious intent, but quite the opposite –he was offended by the way she was dressed, and was telling her so. He wasn't being predatory – he was being prudish. His interest wasn't sexual; it was paternal.

We know Howard's frame of mind because of the comment he made to Hemphill, which was essentially the same as what he told AB: "I don't know why these girls have to show these white boys all that skin." It is very important to note that he made this comment after first asking Hemphill about the student dress code, indicating he believed AB might in fact be violating that standard. The fact that she was *not* violating that standard (based on my understanding of the text of section 422) shows that Howard was holding her to a higher degree of modesty than the generally prevailing community standard rather than considering her from a predatory perspective. This does not absolve Howard of making comments that were improperly personal and offensive, but it does establish why he would not understand his comments were so serious as to trigger his termination.

If Howard had made a salacious or risqué comment to Hemphill, or indicated an improper interest in "these girls," that would have cast his comment to A.B. in an entirely different light. But his comments, as reported by Hemphill, support the conclusion that Howard spoke to her out of concern, even disapproval, rather than with intent to harass. Similarly, he stated during the investigation, without rebuttal, that he also has told male students to pull up their pants.

Howard's comments were inappropriate and offensive, and violated sections 522 and 528. However, given his intent and state of mind, he could not have reasonably

expected that the probable consequence of making those comments would be his termination.

The district cites as a second and equally sufficient reason for Howard's termination his purported dishonesty during the investigation. The District argues that this breach of its trust relates to all aspects of his job: "Especially for an employee in Mr. Howard's position, who operates with little supervision during the day and with access to all District facilities, trust is essential."

Of course, trust is essential in all human relations. But in the employment context, standards of trust exist on a spectrum. At one end are those positions for which total trustworthiness is an absolute necessity, such as law enforcement and corrections. Due to the unique and awesome powers that law enforcement and correctional officers have, and their ongoing need to execute warrants, file complaints and testify in court, it is reasonable for an employer to have a zero tolerance policy regarding untruthfulness. When a municipal employer has reasonably concluded that a law enforcement officer has engaged in misconduct and has lied during the investigation into that conduct, the employer is well within its rights to refuse to allow the employee to continue to exercise its law enforcement powers.

There are also positions outside of law enforcement, especially those with considerable discretion in financial or purchasing positions, for which a zero tolerance policy would be reasonable. A dishonest business manager could do such serious damage to the District's financial and legal standing that a single incident of deception to cover-up a misdeed could justify immediate termination.

But other positions can reasonably have a lesser standard, such that the Progressive Discipline to which the District subscribes is appropriate. And with all due respect to the dignity and responsibilities of custodial personnel such as the grievant, those positions generally have lesser individual responsibility and authority.

Based on the statements of A.B. and Hemphill, I have found that Howard made the comments he denied making. However, the line between making an erroneous statement denying something true and stating an intentional lie can be murky, especially when the speaker asserts he had been feeling sufficiently dizzy on the day in question he went home on sick leave. There is also the very human reaction for someone to disbelieve they had said or done something wrong; during the investigation, Howard readily agreed that the comments he was reported to have made were inappropriate

Given Howard's level of responsibility and authority, the uncertainty as to the extent of his intent in making his misstatements, and the District's adoption of progressive discipline, Howard could not reasonably be expected to know and understand that his comments during the investigation would result in his termination.

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.

The District obviously takes very seriously its education mission, and I respect its commitment to creating an environment that treats all students with dignity and respect, and provides them with a safe and supportive learning environment. This decision in no way challenges or undermines that commitment.

If Howard had engaged A.B. with bad intent, his termination would have been justified. The District has every right to terminate an employee who seeks to prey on its students.

But the record does not establish that was Howard's motive. Instead, it establishes that Howard's motive was to chasten A.B., to have her dress in a less provocative manner. His comments were inappropriately personal and offensive, with both a sexual and racial undertone, but they were not predatory. Even in light of the District's educational mission, termination was excessive, and did not bear a reasonable relationship to the seriousness of Howard's conduct.

Nor does the record establish that Howard had the intentional culpability and high level of authority so that his termination bore a reasonable relationship to his misstatements, especially under the District's policy of progressive discipline.

Progressive discipline presumes that most employees will improve their professional behavior and follow the rules when alerted to the need to do so, but that some won't and will have to be fired. Progressive discipline allows for immediate termination, but only in exigent or extreme circumstances.

This circumstance was neither. Howard made a highly improper but well-meaning comment to a student, and then denied doing so. Each offense was the first of its kind in the record.

This is precisely why the Handbook adopts progressive discipline – to induce corrective action “when an employee's actions fall short of generally accepted standards of

professional behavior, violates a policy or rule, when an employee's performance is not acceptable or the employee's conduct is detrimental" to the District's interests.

The district asserts it had to fire Howard immediately because it could not "run the risk that he would repeat either the inappropriate comment or dishonesty he displayed in this situation." I do not believe the record supports that any such risk exists.

On the basis of more than 26 years adjudicating disciplinary grievances, I believe a suspension of not more than four weeks, plus a "last-chance" provision would be the level of discipline reasonably related to Howard's misconduct. Were I sitting as an independent arbitrator, I would reduce the termination to such a suspension and provision. However, the Handbook under which I am operating does not allow me that option, providing instead that I must either uphold or vacate the termination in its entirety.

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 522 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 in light of the District's educational mission.

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

Executed February 2, 2014

/s/ Stuart D. Levitan, Impartial Hearing Officer