

BEFORE THE IMPARTIAL HEARING OFFICER

In the Matter of the Grievance of

MATTHEW LITKA

with the

SHOREWOOD SCHOOL DISTRICT

Case ID: 185.0002

Case Type: IHO

DECISION NO. 36357

Appearances:

Kim Grady, Representative, 4645 North Sheffield Avenue, Shorewood, Wisconsin 53211, appearing on behalf of Grievant Matthew Litka.

Sarah Platt, Attorney, von Briesen & Roper, S.C., 411 East Wisconsin Avenue, Suite 1000, Milwaukee, Wisconsin 53202, appearing on behalf of Shorewood School District.

BACKGROUND

This case involves the grievance of Matthew Litka (“Litka”), who was discharged on March 11, 2016, from his custodial position at the Shorewood School District (“District”). At the time of the discharge, Litka had been employed as a District custodian for approximately five years. In correspondence provided to Litka, the District indicated that interactions Litka had on March 4, 2016, and March 10, 2016, with two of his superiors were the basis for his discharge. The District concluded Litka had been threatening and insubordinate during these exchanges, and it viewed them as an escalation of conduct for which Litka previously had been disciplined.

This matter has been handled pursuant to the requirements of a grievance procedure specifically applicable to employee discharges which is set forth in the District’s employee handbook. On April 28, 2016, the District filed with the Wisconsin Employment Relations Commission a Request for Impartial Hearing Officer. The filing identified the undersigned as one of three requested hearing officers. Having noted that the District’s grievance procedure appears to require joint selection of the hearing officer, the undersigned contacted the parties to establish whether that procedure had been followed. Ultimately, it was determined that Litka did not participate in the selection process, but only because he declined the opportunity to do so. Given this waiver, I concluded that the District’s unilateral request for a hearing officer was procedurally appropriate.

The District's grievance procedure also provides for several prehearing submissions to the hearing officer. Specifically, the procedure required the District to forward the "grievance record" to the hearing officer, and the District made a 25-page submission to fulfill that requirement. The parties also were given the opportunity, as allowed by the grievance procedure, to submit a position statement to the hearing officer regarding the disposition of the grievance. Litka submitted such a statement on May 13, 2016. The District did not make such a submission. All submissions were forwarded to the opposing party.

Subsequently, just prior to hearing, Litka proposed a stipulation whereby the parties would submit no evidence into the record beyond what already had been provided through the above-described submissions. The District accepted Litka's proposal. Thus, on May 24, 2016, the date that had been set aside for hearing, the parties' representatives made telephonic arguments, whereupon the record was closed. Pursuant to the stipulation of the parties, no additional documentation was provided and no testimony was taken.

DISCUSSION

The procedure that applies here sets forth the following six factors to be considered when evaluating the grievance of a discharged employee:

1. 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.
2. 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. Whether the district administrator's or designee's inquiry was fair;
4. 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;
5. 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;

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

Based on these factors, which are best evaluated out of order, I conclude Litka's discharge was warranted.

Whether the Conduct Occurred

The fourth factor asks whether the evidence supports the inference that the grievant engaged in the conduct that was the basis for the termination. As indicated, the basis for the termination here was Litka's alleged conduct during a March 4, 2016 exchange with Litka's supervisor, Tony Seidita ("Seidita"), and a March 10, 2016 exchange with the District's Director of Business Services and Human Resources, Pat Miller ("Miller").

On March 4, Litka had been having a conversation with Seidita in which Seidita was criticizing Litka's work and the exchange became heated. The District concluded that Litka said to Seidita, "fuck you, fuck Pat [Miller], and fuck everyone up there [in the business office]." The District also understood that when Seidita told Litka to stop, Litka stated, "fuck you, you pussy, what are you going to do about it?" Then Litka said "fuck you" again when Seidita told Litka he would be written up for his comments.

Although Litka repeatedly has asserted that the termination letter in which these comments were recounted was "exaggerated and one-sided, a slanted and semi-false account of what actually happened that day," he never has provided details to support these assertions and never actually denied making the comments. However, in his March 10 written statement regarding the incident, Litka recounted having made a different set of comments. Specifically, Litka indicated that he told Seidita he is "just about the worst boss." Litka also wrote, "Tony's the joke of the Custodial Department and I informed him of it".¹ Also, in his letter to the District initiating his grievance, Litka acknowledged that he "expressed his concerns in anger" in the discussion with Seidita, was "disrespectful," told Seidita he was a bad manager and working conditions would never improve while he was in charge, and that both he and Seidita used profanity during the discussion.

As it happens, Litka also exchanged text messages with a District coworker recounting his conversation with Seidita. Litka told his coworker that he had "lost it on [Seidita]," recounting the conversation as follows:

lots was said ...

the biggest point being he sucks

¹ Litka further commented in his written statement that Seidita "makes up a lot of garbage and no one takes him serious," is a "terrible leader," is "clueless," "lacks th[e] skills to be a decent manager," and "this school will continue to run half assed as long as [Seidita] has the management position." It is not clear, however, whether these represent statements Litka had made to Seidita on March 4, 2016, or whether Litka simply was sharing additional thoughts with the District.

at his job. our department sucks
because he sucks at his job. told
him he is a giant pussy that's
afraid of confrontation and thats
why everyone runs a muck

Litka also recounted the following:

i chased him out the office told
him to get his pussy ass away
from me... . Get out you fuck is
what i said

While Litka acknowledges having sent these messages, he contends that they were “private” and cannot be used against him. The problem with this argument is that the messages became less private when his coworker shared them with the District, and contrary to Litka’s assertion there is nothing “constitutional” that prohibits the District from having introduced them into evidence in this proceeding. Litka also argues that the District only became aware of the text messages after it made the decision to discharge him, so it cannot now use the messages as support for its decision. Notwithstanding this well-taken point regarding after-acquired evidence, the messages are useful as evidence that roughly corroborates the District’s assertions as to what occurred. Finally, Litka has suggested that his digital exchange with his coworker constituted protected, concerted activity. This argument is simply not relevant. The District fired Litka for his interactions with Seidita and Miller, not for his text exchange with the coworker.

On March 10, 2016, several days after Litka’s exchange with Seidita, Miller asked Litka to come to his office to provide a written statement about the incident. During this exercise, Litka had an exchange with Miller in which, the District concluded in the discharge letter, Litka stated that Seidita was “not holding anybody fucking accountable” and Litka identified this as the reason for why the District’s “buildings all look like crap.” The District understood that Litka also said the following to Miller: “[Y]ou don’t know what you’re fucking doing”; “you don’t hold anybody accountable”; “you won’t be here long because you suck at your job”; and “grow some fucking balls.”

Litka acknowledges having been “disrespectful” toward Miller, but he denies having used profanity and, as indicated, generally asserts that the District’s account was exaggerated. The text exchange with the coworker, however, again corroborates certain aspects of the District’s version of events. There, Litka summarized his conversation with Miller as follows:

I had a similar convo with pat.
Told just how bad a job he is
doing as well. Told him he and
Tony are 2 peas in a pod.
Said [] the business office has
been in steady decline since he

showed up ...

Based on Litka's written statement of March 10, his grievance letter, the text messages, and the position statement he submitted in this case, I have concluded that the District's decision to discharge Litka's employment was based on sufficiently accurate information as to what occurred. It is apparent that Litka either said exactly what the District recounted in the discharge letter or his comments were close enough in tone and spirit to constitute conduct on par with what is alleged.

Whether the Grievant Had Adequate Notice

The first factor asks whether Litka reasonably could have been expected to have knowledge of and understand the probable consequences of the conduct that gave rise to the termination. The record before me leaves little room for doubt in this area.

In October of 2015, five months before his discharge, Litka received a written reprimand from Miller regarding an exchange between Litka, Miller, and Seidita regarding timesheets. The reprimand expressly stated that Litka's "language" and "tone" had been "argumentative," "course" [*sic*], and "insubordinate" and that similar future interactions would result in discipline up to and including discharge. Lest there be any doubt that Litka understood that his actions in March of 2016 could result in discipline, we turn again to the text messages. Reflecting on his exchanges with Seidita and Miller, Litka predicts that he is "about to be fired" and "won't be [at work at the District] after tomorrow."

Whether the Investigation Was Adequate and Fair

The second and third factors for consideration relate to the adequacy and fairness of the District's investigation into the incidents that led to Litka's discharge. I interpret these factors to relate to any investigation made prior to discharge rather than any investigation made after the discharge as part of the grievance procedure. The record indicates that prior to discharge the District obtained three written statements regarding the incidents, one from Seidita on March 4, one from John Hayden on March 4 who witnessed the exchange between Litka and Seidita, and one from Litka on March 10. Although the District's subsequent grievance investigation appears to have gone further in reviewing materials – the District Superintendent apparently also interviewed certain employees and reviewed comparable disciplinary records - there is nothing that indicates that the District's discharge decision would have been materially altered by an earlier consideration of these items. As indicated, the discharge letter described in detail what Litka allegedly said that led to his discharge and, as indicated, those allegations appear to have been fairly accurate. Thus, there is no basis for concluding that the District's investigation was unfair or inadequate.

Whether the Conduct Warranted Discharge

The fifth factor asks whether the decision to terminate Litka bore a reasonable relationship to the seriousness of the conduct in light of the District's educational mission. I find

Litka's conduct to have been not only insubordinate but sufficiently serious to warrant summary discharge. When Seidita was attempting to discuss job performance issues with Litka, Litka reacted with hostility and he attacked his supervisor's qualifications. Then Litka did the same with Miller when Miller attempted to discuss with Litka the prior incident involving Seidita.

Litka accurately points out that the District uses a progressive disciplinary system and the third suspension step was skipped here. Litka's argument suggest he believes he was entitled to a suspension before being discharged, but a progressive system does not supply employees with a stack of insubordination chips to be played until they are gone. Seidita and Miller were Litka's superiors, Litka had been warned against such behavior based on prior interactions of the same kind with the same individuals, and there really is no question that his behavior was intentional. All of these factors justify the District's decision to skip a step in the progressive system.

Litka argues there is a "past practice" at the District of not firing employees who engaged in behavior similar to his. In particular, he points to another employee who once swore at staff, slammed a door with enough force to break its glass, and was suspended and sent to anger management classes. In his argument, however, Litka also indicates that this employee is now retired. Assuming the incident is one Litka witnessed, it would have occurred during the five years of Litka's tenure and therefore relatively close to this other employee's retirement. Such an employee likely would have had many more years of employment with the District when his outburst occurred, and it is not known if he had any prior disciplines. Litka had a prior discipline for the same conduct in his relatively short tenure with the District. These are not comparable situations.

Litka also takes issue with the District's claim that discharge was warranted because his conduct was "threatening" in addition to insubordinate. He contends that the District's willingness to let him work for several days after the Seidita exchange undermines the District's assertion here. As discussed, it is clear that Litka himself recognized that his conduct was likely to lead to discharge. Given that factor, the precise characterization the District applied to the conduct is of little significance. The District's use of the term "threatening" could be removed from Litka's discharge letter, leaving only the conclusion that his actions had been insubordinate, and the outcome of this case would be the same.

Finally, Litka has argued that the seriousness of his conduct should be mitigated by the fact that swearing is common and acceptable in his former workplace. This is perhaps the most troubling aspect of this case. The written statement by John Hayden, the only District employee who witnessed the exchange between Seidita and Litka, indicates that both men were using profanity toward each other. Certainly Litka's use of profanity must have contributed in some degree to the District's conclusion that his actions were insubordinate. At least the District has not indicated tolerance toward Litka's use of such language. That being the case, it also was not appropriate for Seidita (or others) to have used profanity, particularly on a regular basis. Nevertheless, these observations do not justify granting Litka's grievance. The substance of Litka's statements from two separate meetings, in which he explicitly challenged his superiors' ability to do their jobs as well as their authority to direct him in the performance of his, would

have been sufficiently insubordinate, even without the profane highlights, to support the District's discharge decision.

Whether the District's Decision Was Unlawfully Discriminatory or Retaliatory

Finally, the sixth factor requires an evaluation of whether the District's decision appeared, on its face, to have been unlawfully discriminatory or retaliatory. Litka has referred, both in his grievance letter to the District and his written submission in this case, to his belief that Caucasian employees at the District are disciplined more frequently than minority employees. He also indicated in his grievance letter that he spoke to Seidita about these beliefs and attributes his discharge in part to having done so. There is no actual evidence in the record before me, however, that would constitute the basis for any such conclusion.

CONCLUSION

The grievance is denied.

Signed at the City of Madison, Wisconsin, this 8th day of June 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne, Impartial Hearing Officer