

IN THE VETERANS PREFERENCE PROCEEDING BETWEEN

JOHN E. JANKU,)	MINNESOTA BUREAU OF
)	MEDIATION SERVICES
)	CASE NO. 10-PA-1081
)	
Veteran,)	
)	
and)	
)	
)	DECISION AND ORDER
INDEPENDENT SCHOOL DISTRICT)	OF
NO. 51 (FOLEY),)	TRI-PARTITE PANEL
)	OF
Employer.)	<u>HEARING OFFICERS</u>

APPEARANCES

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On April 23, 2010, in Foley, Minnesota, a hearing was held before a tri-partite panel of hearing officers, serving under procedures established by Minnesota Statutes, Section 197.46, a provision of the Minnesota Veterans Preference Act (the "Act") -- procedures that permit a veteran employed by a public employer to challenge discharge from employment. The members of the panel are Scott D. Anderson, who was appointed by

the Veteran, Thomas Pederstuen, who was appointed by the Employer, and Thomas P. Gallagher, who was selected to act as the neutral member of the panel by agreement of the parties.

The parties presented post-hearing written argument to the members of the panel, the last of which was received by the hearing officers on May 13, 2010. On August 4, 2010, the members of the panel met by conference telephone call to consider the evidence and the arguments of the parties.

The neutral member of the panel is the author of this Decision and Order and, as such, is responsible for its findings of fact, its reasoning and its conclusions -- though, as I note below, one of the members of the panel concurs in the result and one, dissents from it.

FACTS

The Employer operates the public schools in and around Foley, Minnesota. John E. Janku (hereafter, the "Veteran" or "Janku") began employment by the Employer on April 3, 2006, as a School Keeper at the elementary school operated by the Employer. School Keepers are responsible for cleaning the Employer's school buildings.

On December 8, 2009, Fred Nolan, the Employer's Superintendent of Schools, sent Janku a letter notifying him of his discharge from employment, "pursuant [to the Act], on the statutory grounds of misconduct." The letter gave the following reasons for the Employer's action:

The reasons for your discharge include, but are not limited to, the following: (1) making several threatening

statements about shooting and killing your co-workers in the workplace and in the presence of co-workers; (2) making statements about a co-worker because of her gender; (3) making comments of a sexual nature in the workplace; (4) making rude comments to other staff members; (5) violating School Board Policy No. 413, Harassment and Violence Against Students and Staff, by harassing and bullying co-workers; and (6) violating School Board Policy No. 461, Personnel Policies, by failing to maintain just and courteous relationships with your co-workers. . . .

On January 21, 2010, the Veteran, by his attorney, served notice on the Employer that he challenged his discharge, as permitted by Section 197.46 of the Act, which is set out below:

No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing. Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge.

The parties agree that Janku is a veteran entitled to the protections provided by the Act and that the Employer is a school district subject to the Act's requirements.

I summarize the evidence as follows. In the months preceding his discharge, the Veteran worked with two other School Keepers, Jeffrey Anderson, who began cleaning the elementary school on October 22, 2007, and Michelle Carlson, who began cleaning it in September of 2009. Anderson testified that, during his first week of employment, after he had left a collection of debris on the floor as he was mopping, the Veteran approached him, made his hand into the shape of a pistol -- with

forefinger extended and thumb up -- and said "this is what I would like to do to you, 'poof.'" Anderson testified that, as the Veteran did so, he put his forefinger to Anderson's head and gestured as if pulling an imaginary trigger. On cross-examination, the Veteran testified that it was "very possible" that he had made such a gesture. Anderson testified that he felt threatened by the Veteran's conduct.

Anderson testified that during the winter of 2008 he heard the Veteran say, as they stood in the "commons" area between the elementary school and the high school that he "would like to stand Duane, Gloria and Carol in a line and see if a 30-06 bullet can go through all three" -- referring to three co-employees, Duane Robak, Gloria Midas and Carol Miller. The Veteran denied having made this statement. The evidence shows that the Veteran owns four guns -- a 30-06 rifle, a 16 gauge shot gun, a 22 caliber rifle and a pellet gun.

Carlson testified that on October 5, 1009, the Veteran said in her presence, "if I had a gun, I'd shoot Jeff," referring to Anderson, who was not present. The Veteran admitted having made this statement, explaining that he must have been upset with Anderson at the time. The Veteran also conceded that the statement was a threat and was "very inappropriate."

Carlson testified that on October 6, 2009, the Veteran made a similar statement about Anderson after Anderson had crossed over into another room while vacuuming -- that "I'd kill him if I had a gun." The Veteran testified that it is possible that he made that statement.

Carlson also testified that on several occasions the Veteran made inappropriate statements concerning gender, including the following -- 1) that, soon after she started her employment, he told her "there isn't going to be any favoritism just because you're a girl," 2) that in mid-October of 2009, when Carlson told him that she had recommended to a supervisor that they should clean with micro-fiber towels, the Veteran told Carlson, "oh, you grew a set of balls," 3) that on October 9, 2009, the Veteran asked Anderson, referring to Anderson's wife, "How's the man hater? Has she cut off any balls lately?" In addition, Anderson testified that the Veteran told him on two occasions that he would like to see Anderson's wife naked.

With respect to these allegedly inappropriate statements concerning gender, Janku admitted having said to Carlson that "there isn't going to be any favoritism just because you're a girl" (though, during the Employer's investigation, he denied having made that statement). The Veteran conceded during the Employer's investigation that he told Carlson, "you probably had a set of nuts to say something like that," referring to Carlson's suggestion to a supervisor that micro-fiber towels should be used.

On November 2, 2009, Carlson and Anderson met with Darwin Fleck, Director of Buildings and Grounds to inform him about the Veteran's conduct. During the first part of the meeting, they told Fleck about the Veteran's comments about gender, as described above, and they also objected that the Veteran tried to check their work and to direct it as if he were their

supervisor. Carlson then asked Anderson to leave the meeting so that she could talk to Fleck alone. When Anderson left the room, Carlson told Fleck about the two alleged threats to Anderson that she had heard the Veteran make -- that if he had a gun he would "shoot" Anderson and, a day later, that if he had a gun he would "kill" him. Carlson testified that at the time of this meeting with Fleck, she did not want Anderson to hear about these statements because she thought he would be frightened. The next day, however, Carlson decided to tell Anderson about the Veteran's allegedly threatening statements.

On November 10, Carlson and Anderson met again with Fleck. Anderson told Fleck about the gun gesture the Veteran had made toward Anderson with his hand during the first week he worked with Janku, as described above. In addition, Anderson told Fleck about the Veteran's alleged statement that he would like to see if a 30-06 bullet would go through Robak, Midas and Miller, if they were stood in a line, also as described above.

Carlson testified that she did not report the Veteran's conduct to Fleck before November 2, 2009, because she needed her job and feared that, if she did report the conduct, she might lose it. She also testified that, because she was frightened, she checked with the local office for unemployment compensation to find out whether she could obtain such compensation if she quit her job because she was frightened. The person to whom she spoke at the unemployment compensation office contacted Benton County Deputy Sheriff Michael Kost, who began an investigation of the Veteran's conduct. When Kost interviewed the Veteran, he

denied having made any threats toward Anderson, but, in his testimony, he conceded that he had not been truthful when he made that denial to Kost.

On November 11, 2009, the Employer placed the Veteran on paid administrative leave, as the Employer, through its attorney, began a formal investigation. As described above, on December 8, 2009, after the investigation was completed, Nolan sent the Veteran a letter notifying him of his discharge from employment.

DECISION

The Act prohibits the discharge of a veteran by a public employer "except for incompetency or misconduct" -- a standard substantially equivalent to the "just cause" standard found in most labor agreements.

The following two-part test of "just cause" provides a fair summary of what is "just cause" as defined in American labor law:

An employer has just cause to discharge an employee whose conduct -- either misconduct or a failure of work performance -- has a significant adverse effect upon the enterprise of the employer, if the employer cannot change the conduct complained of by a reasonable effort to train or correct with lesser discipline.

Under this two-part test, an employer must establish

- 1) that the conduct complained of has a serious adverse effect on the employer's operations and
- 2) that the employer has attempted to prevent repetition of the conduct by training and corrective discipline, thus seeking to eliminate any future adverse effect from the conduct before taking the final step of discharge.

The application of the first part of this test requires a determination whether particular conduct is significantly adverse to the employer's operations. Some conduct, however, may be so adverse to operations that discharge should be immediate and need not be preceded by an attempt to change the conduct by training or progressive discipline, as required under the second part of the test. Such serious misconduct may be so adverse that the employer should not be required to risk its repetition.

In the present case, the Employer argues that the grievant's conduct was so seriously adverse to its operations that immediate discharge, i.e., without progressive discipline, is justified -- in order to relieve its employees of the fear occasioned by the alleged threats of the Veteran.

I rule that the Veteran's conduct -- 1) his shooting gesture toward Anderson's head made during the first week of Anderson's employment, 2) his statement to Carlson on October 5, 2009, that if he had a gun he would "shoot" Anderson, and 3) his statement on October 6, 2009, also made to Carlson, that if he had a gun he would "kill" Anderson -- is conduct so adverse to the Employer's operations that the Employer had just cause to discharge the Veteran for serious misconduct without progressive discipline. Usually, a threat made by one employee to another is conduct so adverse to an employer's operations that discharge is the appropriate level of discipline for the first occurrence of such conduct. Clearly, threats of violence disrupt operations by inducing fear and discord in employees of the enterprise. An employer should not be required to use lesser discipline for

such conduct and thereby subject itself and its employees to the risk that the conduct will be repeated. Counsel for the Veteran argues that his conduct should not have been taken seriously by Anderson or Carlson. Though it may be that the Veteran did not intend his conduct to be understood as threatening, they testify that it provoked their fear -- a response that I find was reasonable in the circumstances. Indeed, the Veteran conceded that his statement that he would "shoot" Anderson if he had a gun was a threat and was "very inappropriate."

The Veteran argues that the statements made to Carlson on October 5 and 6, 2009, that he would "shoot" or "kill" Anderson, were made in the presence of Carlson alone and that, as such, they were neither threatening to her nor to Anderson. Carlson testified, however, that she was frightened by the Veteran's statements -- sufficiently so that she contacted the local office for unemployment compensation to find out whether she would qualify for such compensation if she quit her employment because of fear.

Even if the Veteran had no real intention to act as he threatened, the utterance of a threat is itself misconduct, irrespective of the lack of intention to act on it, because those hearing the threat cannot know with certainty what the speaker intends. The usual purpose of a threat is not to give the listener notice of future action, but to provoke immediate fear in the listener.

The Veteran argues that he was denied due process because the Employer did not call as witnesses two co-employees who,

according to Anderson, were present when the Veteran said that he "would like to stand Duane, Gloria and Carol in a line and see if a 30-06 bullet can go through all three." The Veteran notes that the Employer's investigation report states that those two co-employees, when interviewed by the Employer's investigator, denied having heard the Veteran make such a statement. Though the investigation report discloses that denial, the copy of the report that was originally provided to counsel for the Veteran had the names of the two co-employees redacted.

The Employer argues that it was required to redact the names by the Data Practice Act, an obligation that continued until, upon motion of counsel for the Veteran, I ordered the Employer to provide counsel with an unredacted copy of the investigation report. The Veteran also argues that the redacted version of the investigation report may have been presented to the School Board when it made its decision to discharge the Veteran and that, if so, the Veteran was denied due process because the action was based on an incomplete investigation.

I make the following rulings with respect to the Veteran's arguments about due process. First, as I have indicated above, my determination that the Veteran's conduct was serious misconduct constituting just cause for discharge is not based on a finding that the Veteran made the statement at issue -- that, allegedly, he said he "would like to stand Duane, Gloria and Carol in a line and see if a 30-06 bullet can go through all three." When considering the evidence about the

making of that statement, I decided that the evidence was not sufficient to make a finding that the statement was made.

Second, the evidence does not show that a redacted version of the investigation report was presented to the School Board.

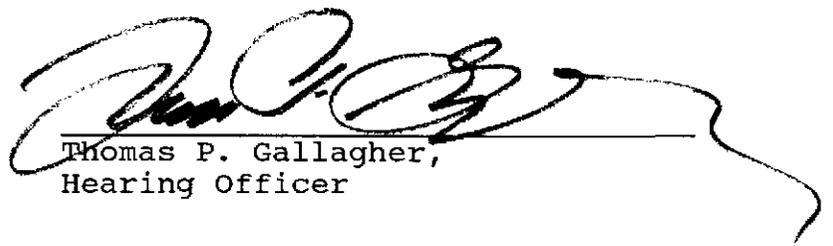
Third, even if it is assumed, as counsel for the Veteran argues, that the original furnishing to counsel of a redacted copy of the investigation report constituted a deficiency in due process, such a deficiency was remedied when the Employer provided counsel with an unredacted copy, thus permitting counsel to call the two co-employees as witnesses for the Veteran.

Fourth, because the investigation report, whether redacted or unredacted, stated clearly that the two co-employees denied having heard the Veteran make the statement at issue, there is no showing that the investigation report attempted to misstate the evidence about that denial either to the School Board, to counsel or to the panel of hearing officers.

ORDER

The Veteran's challenge to his discharge is denied. I note that the hearing officer selected by the Employer concurs in this order and that the hearing officer selected by the Veteran dissents from it.

August 23, 2010


Thomas P. Gallagher,
Hearing Officer