

From: [Luke Berg](#)
To: [Cote, Larry](#)
Cc: [Freiberg, Therese](#)
Bcc: aspiradora@gmail.com
Subject: RE: Following up on two things
Date: Thursday, June 30, 2022 3:47:00 PM

Larry,

Thank you for the response. I will wait to submit the grievance until next Tuesday, but that is when it is due under the District's policy (15 business days from June 14), so I will need to submit it then. But we will drop it if the District will agree to promptly schedule the hearing on the second letter. Alternatively, if the District will agree in writing to extend her deadline to file a grievance, we are happy to wait an extra day or two for the District's response.

- Luke

Deputy Counsel
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From: Cote, Larry [mailto:cotelr@milwaukee.k12.wi.us]
Sent: Thursday, June 30, 2022 1:18 PM
To: Luke Berg <luke@will-law.org>
Cc: Freiberg, Therese <freibetm@milwaukee.k12.wi.us>
Subject: RE: Following up on two things

Good Afternoon Attorney Berg:

Given your below response, we will be moving forward to issue a written disposition in the current misconduct. As to your request to schedule the Emergency Misconduct before school resumes in the fall, our procedure is that we do not schedule Emergency Misconduct Conferences outside of an employee's regularly scheduled work hours. That being said, the concerns raised in your below reply



are being reviewed and there will be a response following the July 4, 2022 holiday.

Sincerely,

Larry R. Coté, Jr., JD

Employment Relations Specialist III, Department of Employment Relations
Office of Human Resources
Milwaukee Public Schools
5225 W. Vliet Street, Room 116
Milwaukee, WI 53208
cotelr@milwaukee.k12.wi.us
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From: Luke Berg <luke@will-law.org>
Sent: Wednesday, June 29, 2022 8:44 AM
To: Cote, Larry <cotelr@milwaukee.k12.wi.us>; Freiberg, Therese <freibetm@milwaukee.k12.wi.us>; King, Ophelia T <kingot@milwaukee.k12.wi.us>
Cc: Lucas Vebber <lucas@will-law.org>
Subject: RE: Following up on two things

Caution External Source

Larry, Therese, and Ophelia,

Thanks for this response. Marissa is not interested in resigning her position. She loves her job and is good at it, and she intends to fight for it. Nothing the District has identified thus far warrants terminating her (or any discipline, for that matter). If the District changes its position and is willing to discuss a resolution where Marissa keeps her job, please let us know, because we remain open to discussions about that.

Regarding the "Emergency Scheduling Letter" dated June 14, we renew our request to promptly schedule a hearing with respect to whatever allegations that letter pertains to. Waiting until the fall to schedule a hearing violates Marissa's due process rights, has no reasonable justification, and substantially prejudices her and increases the damages to her should she eventually be terminated. If the District will not promptly schedule a hearing, we intend to file a grievance pursuant to the District's grievance procedures, and may pursue other legal avenues as well. As we have consistently communicated, our goal is and has been to work with the District to resolve this without further escalation. But suspending Marissa without any pre-suspension hearing or notice of what she is accused of and without any prompt post-suspension hearing is unreasonable and does substantial

harm to her. Please let us know **by Thursday** whether you will promptly schedule a hearing, as we plan to submit the grievance on Friday.

The only conduct that the District has so far identified as potentially violating District policies (in connection with the prior, June 9 letter) all relates to Marissa's speech on her private time, which, as we explained in detail in her written response to those allegations, is protected by the First Amendment. Presumably the second, June 14 letter is also related in some way to her speech, and to the extent it is, suspending Marissa based on that is separately a First Amendment violation.

Our understanding, based on your prior communications, is that the suspension that began on June 14 is indefinite, will continue into the fall, and is now without pay. The suspension has already prevented Marissa from pursuing summer opportunities with the District. Our understanding is also that the suspension is connected to the allegations associated with the June 14 letter. Yet the District has not provided any notice to Marissa of what she is accused of - that letter only lists various policies she allegedly violated, but does not describe any conduct that violates those policies. Nor has it given her any opportunity to respond within a reasonable time.

The United States Supreme Court and Wisconsin Supreme Court have recognized that temporary suspensions can implicate Due Process protections. *See Gilbert v. Homar*, 520 U.S. 924 (1997); *Arneson v. Jezwinski*, 225 Wis. 2d 371 (1999); *see also Goss v. Lopez*, 419 U.S. 565 (1975). While employers can in some circumstances suspend an employee without *prior* notice and opportunity to respond, the employer must at least provide "the suspended employee [with] a *sufficiently prompt* postsuspension hearing." *Gilbert*, 520 U.S. at 932. When considering due process claims based on delay, courts consider the "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *E.g., United States v. Eight Thousand Eight Hundred & Fifty Dollars (\$8,850) in U.S. Currency*, 461 U.S. 555, 564 (1983).

The District has no good reason for delaying a hearing, especially one that it has labeled an "emergency conference." The only reason the District has given is that "Emergency conferences are not held on off hours, vacation days, weekends, holidays, during approved leaves, or summer break." But it is our understanding that neither Ms. King nor Ms. Freiberg (who presumably would be the only two District employees participating in the hearing, as in the hearing on June 15) are on "summer break." And Marissa is available to participate in a hearing at any time this summer during Ms. King's and Ms. Freiberg's scheduled hours. Delaying the hearing because *Marissa* - who is suspended - is on "summer break" is not a reasonable or rational justification for delaying an "emergency" hearing until the fall.

Delaying the hearing until the fall also substantially prejudices Marissa. As we explained during the June 15 hearing, the District's delay makes it impossible for Marissa to make decisions about her future career. If Marissa is going to be terminated, waiting until the fall makes it significantly harder for her to find new employment, given that her job as a school guidance counselor is tied to the school year. And the suspension has already prevented her from pursuing summer opportunities with the District. Further delay will increase the damages to her, should this result in litigation (again, we hope it does not come to that).

The length of delay that the District is contemplating - nearly three months, while Marissa remains suspended - is also unreasonable on its face. In *Gilbert*, the Court required a post-suspension hearing to be "sufficiently prompt." 520 U.S. at 932. In *Goss* - in which students received only a ten-day, temporary suspension from school - the Court emphasized that "the necessary notice and rudimentary hearing should follow *as soon as practicable*." 419 U.S. at 582-83. For further comparison, suspensions of state employees cannot exceed 30 days, and the employer must furnish its reasons for the action in writing. Wis. Stat. 230.34(1)(b).

Thus, leaving Marissa in an indeterminate state for nearly three months without any notice of what she allegedly did that warrants a suspension or any opportunity to respond violates her due process rights and potentially her First Amendment rights as well.

Please let us know as soon as possible, by Thursday at the latest, whether the District will promptly schedule the hearing on the second letter.

- Luke

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From: Cote, Larry [<mailto:cotelr@milwaukee.k12.wi.us>]
Sent: Friday, June 24, 2022 11:33 AM
To: Luke Berg <luke@will-law.org>
Cc: Freiberg, Therese <freibetm@milwaukee.k12.wi.us>
Subject: RE: Following up on two things

Dear Attorney Berg:

At this time the District would be interested in discussing a resolution that resulted in Ms. Marissa resigning and entering into an agreement that includes a release of claims, and a provision that she will not seek future employment with the District, in exchange for the District administratively dismissing and not pursuing or rendering a final disposition in either of the pending misconduct cases. As to the issue of the scheduling of the Emergency Misconduct Conference, as it was

previously explained, Emergency Conferences are not held on off hours, vacation days, weekends, holidays, during approved leaves, or summer break. The Emergency Conference will not be held until the Fall.

If you are interested in pursuing the resolution of this matter as I outlined above, let me know.

Sincerely,

Larry R. Coté, Jr., JD

Employment Relations Specialist III, Department of Employment Relations

Office of Human Resources

Milwaukee Public Schools

5225 W. Vliet Street, Room 116

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From: Luke Berg <luke@will-law.org>

Sent: Tuesday, June 21, 2022 1:47 PM

To: Cote, Larry <cotelr@milwaukee.k12.wi.us>

Cc: Freiberg, Therese <freibetm@milwaukee.k12.wi.us>; King, Ophelia T <kingot@milwaukee.k12.wi.us>

Subject: RE: Following up on two things

Caution External Source

Larry, Therese, and Ophelia,

Following up from our call last Friday morning. As I mentioned on the phone, Marissa is interested in discussing a way to resolve this where she retains her job. Is the District interested in discussing such a resolution?

Therese,

I am also following up on my question about the second letter. Can the conference related to that be scheduled soon? Thanks!

- Luke

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From: Luke Berg
Sent: Friday, June 17, 2022 7:17 AM
To: Cote, Larry <cotelr@milwaukee.k12.wi.us>
Cc: Freiberg, Therese <freibetm@milwaukee.k12.wi.us>; King, Ophelia T <kingot@milwaukee.k12.wi.us>
Subject: Re: Following up on two things

Therese - thanks for the quick follow up.

Larry,

From the District's perspective, what would it take to resolve this so everyone can move forward and Marissa can get back to doing the job that she loves?

- Luke

On Jun 16, 2022, at 5:54 PM, Freiberg, Therese <freibetm@milwaukee.k12.wi.us> wrote:

Good Evening,

We are willing to discuss resolution prior to receiving Ms. Marissa's response.. Please contact Mr. Cote directly.

Thank you,

Therese Freiberg
Director

Department of Employment Relations
Office of Human Resources
Milwaukee Public Schools
Phone (414) 475-8280
freibetm@milwaukee.k12.wi.us

From: Luke Berg <luke@will-law.org>
Sent: Thursday, June 16, 2022 11:49 AM
To: Freiberg, Therese <freibetm@milwaukee.k12.wi.us>; King, Ophelia T <kingot@milwaukee.k12.wi.us>
Subject: Following up on two things

Caution External Source

Ophelia / Therese,

Following up on two things:

First, as I mentioned yesterday, we are interested in working with the District to resolve this so that everyone can move forward. I believe I heard you say yesterday that we could have those conversations outside the formal conference. Are you interested in having a discussion now about that, or would you prefer to wait until after we formally respond on the 27th?

Second, regarding the second letter/conference, Marissa would like to proceed with that as soon as possible so that, if she is terminated, she has sufficient time to find a new job. Is it possible to schedule that in the next couple weeks?

Thanks!

- Luke

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