
 In the Matter of the Arbitration between)
)
UNION OF ESCAMBIA EDUCATION)
STAFF PROFESSIONALS) One-Day Suspension
) Article IX.2
 and) AAA# 01-17-0004-8293
) Grievant: Jane Grievant
SCHOOL DISTRICT OF ESCAMBIA COUNTY)
)

BEFORE : Mark Lurie, Arbitrator

APPEARANCES

Union of Escambia Educ. Staff Professionals : ***** , Esq.
 School District of Escambia County : ***** , Esq.

This is a grievance arbitration decision issued pursuant to the collective bargaining agreement effective July 1, 2013 through June 30, 2016 (the “CBA”) between the School District of Escambia County, Florida (the “District”) and the Union of Escambia Education Staff Professionals, FEA, NEA, AFT (the “Union”) representing, among other job classifications, the employees serving as District Teacher Assistant Specialists (“TAS”).

Upon due notice, the parties appeared at the prescribed arbitration hearing time and place: March 1, 2018 at 9:00 a.m. at the District’s Human Resources Conference Room in Pensacola, Florida, where they presented their respective positions and the evidence in support of those positions. The hearing was transcribed; the transcription is the official record. The advocates furnished written closing arguments that the Arbitrator received on April 16, 2018, as of which date the hearing was declared closed.¹

1 CBA Article II.3 Grievance Procedure, D. – Level III – Arbitration
 ...The hearing officer/arbitrator shall be charged to interpret the terms and conditions of this Agreement as they relate to the grievance and shall have no power to alter, amend, add to or delete from the terms of the Agreement...

ISSUE

The issue is whether the 1-day suspension of Ms. Grievant was for just cause and, if not, what the remedy should be.

BACKGROUND

The Escambia Westgate Special Center (the “Center”) serves Pre-Kindergarten through High School students with intellectual and emotional disabilities. The grievant, Ms. Jane Grievant, has been a TAS at the Center since 2008. Her performance ratings each year have been good. During the most recent school year, she was rated Effective.² Ms. Grievant had not previously been issued a discipline.

Ms. Grievant received annual training in the correct way to interact with autistic children. In September 2016, she received that training under a program titled “Safety Care.”³ Among other things, the program required that, when physically guiding emotionally disabled students, caregivers place an open palm on the student’s arm (just above the elbow) and, using light but persistent pressure, urge them forward. Alternatively, the caregiver could stand behind and to the side of the student and, placing an open palm on the student’s distant shoulder, place their other palm on the back of the student’s other arm. The Safety Care program included the following prohibitions:

Don't use physical management for convenience, coercion, punishment, to show the person that you are in charge, or because de-escalation is taking "too long"

Don't use joint locks or pressure points. Don't twist or hyper-extend joints.

Don't place the person into an uncomfortable or awkward physical posture.

Don't use physical management to inflict pain.

Don't use more force than necessary for safety and stability.

Don't continue using physical management longer than necessary for safety.

The events that gave rise to Ms. Grievant’ 1-day suspension took place on September 20th, 2016. Ms. Grievant was working in the classroom of Teacher Amy Green, who was absent that day. The misconduct charged was unwarranted physical contact with and yelling

2 The ratings are Unsatisfactory, Needs Improvement, Effective and Highly Effective.

3 Ms. Teresa Colburn who was Principal at the Center at the time of the events in this case, and Ms. Jobenna Sellers, who was then Assistant Principal and is currently Principal of the Center, each testified that the misconduct charged in this instance would have been impermissible under both the Safety Care program and under its predecessor programs. [Tr 34 and 36 respectively]

at a male student (the “Student”) who was described as autistic and non-verbal. A security camera, mounted above the door to the classroom and capturing the room’s interior, recorded a silent video of the interaction. The Arbitrator watched the video and has extracted still images from it; those images will accompany his description of the salient events.

Ms. Grievant and the Student entered the classroom with Ms. Grievant holding the back of the Student’s T-shirt. She directed him to his seat by pulling on his shirt and coaxed him forward by pressing her hand against his back.



The Student did not remain in his seat but, instead, wandered about in the back of the room. He apparently knew that Ms. Grievant kept the key to a snacks cabinet in the pocket of her hoodie. He approached from behind her and gently slid his right hand into the right pocket of the hoodie.



The Student withdrew his hand without having grasped the keys.



Ms. Grievant turned, approached the Student, spoke to him, and grasped his left wrist or hand.



Either the student pushed his left hand down or Ms. Grievant did. She did not release her grasp.



Ms. Grievant continued to hold the Student's left hand or wrist as he turned toward her.



He appeared to be in some distress.



As Ms. Grievant continued to hold the Student's left hand, she grasped his right hand.







Ms. Grievant released the Student's right hand while retaining a grip on his left wrist.



Ms. Grievant grasped both of the Student's wrists. Again the Student appears to be in some distress. Ms. Grievant released the Student's left hand and led him to his chair.





All other students were escorted out of the classroom for lunch at 11:30 a.m. Ms. Grievant stayed behind with the Student. She testified that she did this in order to calm him down. About 45 seconds after the other students had departed, the Student started to get up from his desk. Ms. Grievant signaled for him to stay seated.





At 11:32 a.m., Ms. Grievant indicated to the Student that they would leave for lunch. The Student approached a cabinet and gently struck his head against it. Former Center Principal Teresa Colburn testified that this was an indicator of frustration.⁴



As Ms. Grievant and the Student were departing the room, they approached a full-length mirror on the wall. The Student slapped the mirror gently with the palm of his upraised hand; then leaned the left side of his body against the mirror and, while leaning, gently struck the left side of his head against it. Again, the head striking was described as symptomatic of stress.

⁴ Transcript page 27.



Ms. Grievant escorted the Student away from the mirror, seated him, and summoned a Behavioral Technician – Mr. Joe Denmon – to the classroom.

Teresa Colburn was Principal of the Center in September 2016. She testified that she became aware of the salient events when another teacher's aide, Ms. Martha Pate, who had been present in the classroom, told her that Ms. Grievant had been aggressive in her interactions with the Student.⁵ Principal Colburn testified that she viewed the surveillance video and concluded that that it corroborated what Ms. Pate had told her (albeit that the surveillance video was silent).

A District Investigator, Mr. Gary Marsh, investigated the allegations of misconduct. On October 19, 2016, he attempted to interview Ms. Grievant but she declined and, instead, furnished the following written statement:

Regarding the incident that happened on September 20, 2016 at Escambia Westgate Center, I deny the allegations. Any actions I took were professional and appropriate for the situation.

Mr. Marsh prepared an Investigative Report dated October 28, 2016 (the "Report"). It reiterated Ms. Pate's statements: to wit, that Ms. Grievant had twisted and squeezed the Student's hand with sufficient force to cause the Student to cry out in pain and that Ms. Grievant had yelled at him. The Report found that, while Ms. Grievant's actions could have adversely affected the Student's mental and emotional well-being, evidence of "maltreatment" or "physical injury" had not been substantiated. Ms. Grievant's conduct was reported to the Department of Children and Family Services, which found no abuse.

By letter of October 31, 2016, Ms. Grievant was informed that disciplinary action was being considered against her for Violations of Escambia County School District Code of Ethics, Improper Conduct Regarding Students. It instructed her to appear in the office of Personnel Services Director Elizabeth Oakes with her Union representative to discuss the proposed action. A second letter of that same date informed her that District Superintendent Malcom Thomas intended to recommend to the School Board that she be issued a 1-day disciplinary suspension.

5 Principal Colburn testified that Teacher's Aide Martha Pate told her that Ms. Grievant had been "verbally aggressive" with the Student and had yelled at him.

... [Ms. Grievant] grabbed his arms and she was squeezing or twisting, Martha told me, to the point where the student was saying, "aww, aww, aww." And she [Pate] was concerned about the grabbing, and to the point where he would cry out in pain.

Principal Colburn also testified about other statements made to her by Ms. Pate, all of which are hearsay. However, Ms. Pate appeared in this arbitration hearing, and her testimony was consistent with the statements that Principal Colburn attributed to her. In the images presented, Ms. Pate is the person in the striped shirt..

The CBA requires that discipline be “progressive, fair and only for just cause” and that, “before any action to discipline,” a supervisor meet with the employee and seek “to alleviate the problem”⁶ and that, as a first step, there is to be a counseling session “When an employee is having difficulty doing his/her job” or “is violating School Board policy.”⁷ The Union asserts that Ms. Grievant was denied that Step I counseling session.

The Arbitrator deems the Step I progressive discipline counseling session provision to have been inapplicable in this instance. Progressive discipline pertains to repeated minor performance failures for which any single act does not warrant discipline but for which recidivism does. Progressive discipline does not pertain to misfeasance like that with which Ms. Grievant was charged: acts which, if proven, warrant more substantial discipline than counseling for a first offense.

The CBA states that, prior to issuing discipline, the “appropriate administrator and/or supervisor” is to furnish the affected employee with “an accurate accounting of the offense.” The same CBA provision states that “A conference shall be scheduled to discuss the disciplinary action being considered” and that “[the supervisor] shall provide written notice to the employee of the nature of the complaint and all pertinent information giving an accurate accounting of the offense or problem.”⁸

6 CBA Article IX.2 - APPROPRIATE DISCIPLINARY PROCEDURES

- A. Discipline of any type shall be administered only by the appropriate supervisor or administrator.
- B. All discipline shall be progressive, fair and only for just cause.
- C. Prior to any action to discipline an employee, the appropriate administrator and/or supervisor shall discuss the nature of the situation and suggest remedies to alleviate the problem.

7 CBA Article IX.2 - APPROPRIATE DISCIPLINARY PROCEDURES

When an employee is having difficulty doing his/her job or in his/her attendance at work, or is violating School Board policy or the Master Contract, the following steps shall be taken:

Step I - Counseling Session

The appropriate administrator or supervisor shall hold a counseling session with the employee and attempt to help the employee overcome his/her difficulties. A copy of any record of this counseling session shall be retained by the administrator or supervisor and a copy given to the employee. The Counseling Session Form is entered as Appendix D in this Agreement.

8 CBA Article IX.2 - APPROPRIATE DISCIPLINARY PROCEDURES

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Step II - Consideration of Disciplinary Action

- a. Prior to further disciplinary action, the appropriate administrator and/or supervisor of the employee shall provide written notice to the employee of the nature of the complaint and all pertinent information giving an accurate accounting of the offense or problem and the time and the date of the offense and allow the employee time to secure appropriate representation. A conference shall be scheduled to discuss the disciplinary action being considered. A copy of such notice shall be provided to the employee at least one full work day prior to discussing any consideration of disciplinary action. The employee shall have the right to

On October 31, 2016, Ms. Grievant was furnished with written notice of meeting to discuss the charges. It stated, in part, that

You were previously advised that disciplinary action was being considered for Violations of Escambia County School District Code of Ethics, Improper Conduct Regarding Students. You are to appear in my office on Tuesday, November 1, 2016, at 1:00 p.m. You have the right to have a Union representative present at this meeting. It is your responsibility to secure such representation.

In its post-hearing brief, the Union equated this notice of meeting with the notice requirement of CBA Step II:

...written notice... of the nature of the complaint and all pertinent information giving an accurate accounting of the offense or problem and the time and the date of the offense.

The Arbitrator finds that the purpose of the October 31st notice of meeting was not to communicate “all pertinent information” about the complaint but, instead, was to notify Ms. Grievant of the November 1st meeting. At that meeting Principal Colburn and H.R. Director Keith Leonard presented Ms. Grievant and her Union representative with the pending charges and showed her the video, and Ms. Grievant had the opportunity to tell her side of the story.⁹ The Arbitrator deems that meeting to have satisfied the “all pertinent information” CBA requirement.

The Union also asserted, in its brief, that Ms. Grievant was not given the Step II opportunity to discuss the “disciplinary action being considered.” The Arbitrator finds that Ms. Grievant had that opportunity at the October 31st meeting.

The District Superintendent, the Deputy Superintendent, Assistant Superintendent, H.R. Director Keith Leonard and Principal Colburn met and came to a consensus about discipline. Their consensus was to recommend to the School Board that Ms. Grievant be issued a 1-day suspension. Neither Ms. Grievant nor any Union representative was invited to attend that meeting. The Arbitrator finds that no CBA provision required that they have been

have a Union representative attend the conference. It shall be the responsibility of the employee to secure appropriate representation.

Step III - Disciplinary Action Meeting

- a. The appropriate administrator and/or supervisor shall notify the employee in writing at least one full day in advance of the date and time that any Disciplinary Action Meeting shall take place. The purpose of the meeting will be for the administrator to present the employee with notice of the disciplinary action to be implemented. Prior to such meetings, the employee shall have been provided a copy of the written notice containing information and an accurate accounting of the offense. Said notice shall also inform the employee that he/she has a right to have a Union representative present when the disciplinary action is given, and that it is the responsibility of the employee to secure this representation.

⁹ Principal Colburn’s testimony, Tr 29.

in attendance. On November 15, 2016, the District Superintendent recommended to the School Board that Ms. Grievant be issued that suspension, and the Board did so.

THE DISTRICT'S POSITION

In the arbitration hearing, the District submitted, in addition to the video, the testimony of Ms. Pate. She said, in relevant part, the following:

A All ... I observed was that she [Ms. Grievant] had ahold of one of the student's hands and was crushing them.

Q And how was -- did it appear that way that was enough to cause pain?

A Yes, sir.

Q Did you hear anything, in terms of the event, that led you to believe the student was experiencing pain?

A Yes, sir. I heard him pull his hands back going "aww."¹⁰

The current Principal at the Center held the position of Assistant Principal during the events in this case. She testified that she had viewed the video and that, in her opinion, Ms. Grievant' conduct had not been "in line with any of the training that we had provided."

Another District witness, District Program Specialist for Emotional Behavioral Disabilities, Ms. Donna Perry, testified that she had viewed the surveillance video and that, in her opinion, Ms. Grievant' actions contravened the training that the District had furnished teachers aides.¹¹

¹⁰ [Tr 43]

¹¹ The following is Ms. Perry's testimony, Tr 47-48:

Q What did you see that told you that it was not consistent or in accordance with the training?

A One of the interactions, when she enters the classroom and she has the young man by his shirt, we teach in Safety Care a supported guide. So if you were guiding a child into the classroom, not restraining, just guiding them to their seat, that would have been the appropriate protocol. It appears, in the video, that she inflicts some sort of pain on the way he moves.

Q Is that in the way of holding his hands or wrists?

A This is when she had him by the shirt... -- in the back. And I don't know what happened, but with the way he moved... in a supported guide, her hands would have been open, palms against his shoulder and elbow to guide him to his seat.

And then the second incident that I saw of concern, when he reached for her keys, and I saw her grab his hands and he was trying to get away. We don't -- we don't grab children's hands. We stress, in the training, that we stay off the joints. We don't squeeze fingers; we have blocking techniques and we have what we call an elbow check, where you, again, open palm check a child away from you, if they're encroaching on your space.

Q And that's what you observed in terms of that was not consistent with the training -- ...that the District requires of teacher's aide and those in physical contact with students?

A Yes.

THE UNION'S POSITION

The District did not follow the CBA's discipline procedures and did not have just cause to issue the suspension. Ms. Grievant's actions on September 20, 2016 were both professional and appropriate. Testifying on her own behalf,¹² Ms. Grievant explained that the reason she had held on to the Student's shirt was that it had been a reasonable way to restrain him, and that she had never been told that she couldn't use that means of restraint.¹³

Ms. Grievant testified that when the Student had attempted to retrieve the cabinet key from her pocket, he had come at her "suddenly" and "very abruptly"¹⁴ and that when she had grabbed his hand she had said to him "Please do not go into my pocket." Ms. Grievant testified that, when grasping the student, she did not apply pressure; that her intent was to "redirect" him; and that she "eventually turned him loose."¹⁵

I handled him with the least inflict of any kind of pain in the arm. Not -- if I was not supposed to grab him or hold him, but there have been times when you have to... I don't know no other way, as to guide him safely.¹⁶

The Union presented the testimony of Georgetta Smith who, for 38 years prior to June 2016, had been a Special Education Teacher at the Center, working with children within the autism spectrum. Ms. Smith testified that Ms. Grievant had assisted in her classroom for 5 or 6 years; that she had been dependable and, during their time together, she had been no more aggressive with students than had anyone else.¹⁷

12 Ms. Grievant testified, inter alia, about behavioral improprieties committed by the Student at times other than during the events that gave rise to her discipline. That conduct, including overt masturbation and other sexual exhibitionism, had no explicable bearing on Ms. Grievant's interactions with the Student, and are therefore irrelevant.

13 [Tr 76-77]

A On the way coming back [to the classroom], he was snatching other children's artwork and work off the walls. And so what I did was, I just got the shirt and it didn't restrict him, it just gave him Jess arm reach to where he couldn't pull nobody's stuff down.

Q Is that typical guiding students?

A Yeah. I was never told I couldn't do it before.

14 Tr 82.

15 Ms. Grievant's testimony, Tr 77-78.

A *He attempted to go in my pocket. He came at me so suddenly. So what I did was, I just grabbed him by the hand and I said to him, "Please do not go into my pocket." And being that I'm already holding him, he was like squiggling and wanted freedom. And I eventually turned him loose. I didn't put no pressure. There was no intent to harm; no intent to bruise. I was just trying to redirect him. Get his attention.*

16 Tr 83

17 Ms. Smith also testified about a number of behavioral manifestations that the Student had previously engaged in but that were not present in this case. They included hitting, biting, kicking and lack of sexual self-control.

Finally, the Union presented the case of Linda Jansky in support of a claim of disparate treatment. Ms. Jansky was a District secretary who had participated in dragging a student against her will down a corridor. She had received neither discipline nor a counseling. The Arbitrator notes that disparate treatment is an affirmative defense which requires that the comparator employee be one who is similarly situated to the grievant; in other words, that she represent a reasonable basis for comparison. The Arbitrator finds that Ms. Jansky did not. Ms. Jansky's job did not entail the caregiving or teaching of students; she had not been trained in how to interact with emotionally disabled students; she had no experience in engaging in such interactions; and, when dragging the student, she had been following the directions of a Guidance Counselor who had spontaneously recruited Ms. Jansky's assistance.

DECISION

The Arbitrator finds that the video recording, supplemented by Ms. Pate's testimony, prove that Ms. Grievant engaged in the misconduct with which she was charged and that Ms. Grievant's explanation – that she was attempting to “redirect” the Student – is not credible (1) because, at the time she initiated contact, the Student had ceased engaging in any activity from which redirection was required and (2) because the substance, duration, intensity of Ms. Grievant's grappling with the Student exceeded plausibly reasonable conduct. Regarding Ms. Grievant's testimony that she had never been told she should not guide a student by grasping the back of his shirt, the Arbitrator finds the argument to be invalid. The District could not be expected to have anticipated and prohibited every conceivable act of misfeasance, as the list would number in the thousands and still not reach the limits of human inventiveness. But, more importantly, to not explicitly prohibit an action is not to permit it.

The Arbitrator finds that Ms. Grievant engaged in the misconduct with which she was charged and that a one-day suspension was within the range of reasonable discipline.

AWARD

The grievance is denied.

