

a provision of the Minnesota Veterans' Preference Act, but the parties have agreed, as I describe more fully below, that this matter is to be determined in accord with the provisions of a labor agreement between the Employer and Education Minnesota -- Osseo Educational Support Professionals (the "Union"), a local affiliate of Education Minnesota.

The parties presented post-hearing briefs on January 18, 2009. They also presented other post-hearing materials, the last of which was received on March 9, 2009.

FACTS

The Employer operates the public schools in and near Osseo, Minnesota. The Grievant was hired by the Employer in December of 2005, and on February 6, 2008, the Employer's Board of Directors (the "School Board") terminated his employment. He was classified as an Educational Support Professional (hereafter, "Paraprofessional", as the parties refer to the classification). As such, he was a member of the Union. At the time of the Grievant's discharge, the Employer and the Union were parties to a labor agreement that, from July 1, 2006, through June 30, 2008, established the terms and conditions of employment of the Paraprofessionals employed by the Employer. The parties agree that the issues raised in this proceeding are to be decided in accord with the provisions of that agreement.

During all of the Grievant's employment by the Employer, he worked at the North View Junior High School ("North View"), assisting a Special Education Teacher, Pen D. Standifer, in a special education classroom (hereafter, sometimes "Standifer's

Classroom") that served Eighth Grade and Ninth Grade students classified as Emotionally and Behaviorally Disabled ("EBD"). Typically, EBD students may display behaviors that are socially inappropriate, i.e., emotional, aggressive or hyperactive conduct. Another Paraprofessional, Anthony Tate, also assisted in Standifer's Classroom.

The conduct that forms most of the basis for the Grievant's discharge is alleged to have occurred in late 2007. At that time, about eight students were assigned to Standifer's Classroom as the place where they received direction intended to overcome their disabilities, some academic instruction and assistance with academic assignments. Most of the students' academic instruction occurred in "mainstream" classrooms, which they visited accompanied by the Grievant or Tate.

As noted above, the School Board discharged the Grievant on February 6, 2008, but the record does not include anything in writing that states the reasons for his discharge. An investigation by representatives of the Employer preceded the action of the School Board by about a week. The Grievant was given oral notice of his discharge on February 1, 2008, at a meeting attended by him and Anita Kerfeld, a Union representative, and by three representatives of the Employer -- Rodney D. Barnes, Director of Human Resources, David Tramel, North View's Business Manager, and Peggy Vickerman, North View's Principal. It appears that the Employer did not express in writing the reasons it had for discharging the Grievant, either before or after March 3, 2008, the date of the grievance. Because of the

lack of a written statement of the reasons for the discharge, I summarize those reasons, as given in the testimony at the hearing before me.

Marian D. Boyd, North View's Assistant Principal in early 2008, testified that on January 29, 2008, in a "re-entry" interview of a student who had been suspended from Standifer's Classroom, the student told her that Tate had wrestled with students in the "backroom" -- an enclosed storage room referred to by some witnesses as the "closet." This storage room, which is at the back of Standifer's Classroom, is about six feet wide and ten feet long. To obtain a fuller account, Boyd decided to interview other students from Standifer's Classroom, and she did so on January 30, 2008. She testified that one of the students, John Doe*, told her that, on one occasion, the Grievant had wrestled with him in the storage room "for about a half a minute, maybe," putting him in a headlock. Below, I set out Boyd's testimony describing the account given to her by Doe:

Well, he [Doe] told me that it happened a long time ago, that he and [the Grievant] had wrestled in the backroom, and it had begun as a sort of a confrontation or a back and forth between those two, between [the Grievant and Doe], and then another student, [Richard Smith], had jumped in and said in a joking way, "I bet you can't beat him up, I bet you can't beat him up," and when [the Grievant] said something like, "Well, let's go to the backroom," and then [the Grievant] opened the door and [Doe] went in, and then they put each other in headlocks. It didn't last a long time, as far as I can recall [Doe] saying, but when they left, when they came out, they were laughing.

* To preserve the anonymity of students, I refer to them by fictitious names.

Boyd testified that she could not recall whether any other student had reported that the Grievant had wrestled with him, except that she thought Smith may have given such an account. Boyd testified that it was inappropriate for the Grievant to wrestle with Doe, that such behavior is contrary to the goal of directing an EBD student in proper social behavior.

Barnes' testimony gave the following account of the occasion when the Grievant and Doe went into the storage room to wrestle:

[Doe] indicated that there was horseplay. The students who testified** witnessing -- the testimony was that [the Grievant] was near the closet door, [Doe] was badgering him that, "I couldn't beat you up," and he was badgering [the Grievant] to take him in the closet so they could engage in this activity. [The Grievant] initially said "No, [Doe], I'm not going to do it." [Doe] continues to badger him, [the Grievant] says, "Okay, let's go in the closet." They go in the closet, the door is left cracked open, the other kids can hear laughing and joking around going on. [Doe] says there's treats kept in that closet, and [the Grievant] offered him candy if he went out of the room and acted as though they had engaged in activity and I had hurt you, and [Doe] reported that and [the Grievant] confirmed that testimony in our interview.

Barnes testified that the Employer did not allege that the Grievant intended any physical harm to Doe, but he also testified that the Grievant's behavior toward Doe violated the Employer's corporal punishment policy because it caused "emotional harm" to Doe -- testimony that I interpret as a statement that the behavior was harmful to Doe because it was inappropriate to the proper treatment of the disability of an EBD student.

** Barnes uses "testify" as a verb to describe responses of students during investigative interviews on January 30.

Doe was the only student who testified at the hearing. He testified that notes taken by Boyd as she interviewed him on January 30, 2008, were true. The part of the notes that describe his statements are set out below:

[John Doe]:

- [The Grievant and Tate] had previously allowed [Doe] and [Smith] wrestled in the backroom "a long time ago." [Doe] could not remember when the previous incident between [Smith] and himself occurred.
- [Doe] said that he and [the Grievant] wrestled in the backroom one time.
- During a discussion, he said to [the Grievant], "I'm sick of you."
- During the discussion, [Smith] said, "I bet you can't wrestle him. I bet you can't beat up [the Grievant]."
- [The Grievant] said something like, "Let's go in the backroom," or "C'mon."
- [The Grievant] opened the door to the backroom first and [Doe] went in first.
- They started playing around, wrestling and stuff. "We were putting each other in headlocks."
- [Doe] believes the activity/wrestling lasted about 20-30 seconds - but he is not sure.
- Both [the Grievant and Doe] remained on their feet during the incident. They did not fall.
- They then returned to the main classroom laughing.
- It occurred on a day when Mr. Standifer was absent. The sub was not in the classroom.
- Students present - [Two others in addition to Smith and Doe].
- He is not sure if Tate.
- The sub had left the room.

On a different occasion:

- [Doe] cannot remember the date. He said it happened a long time ago when [two names] were students.
- He said he believes it was October or November (2007).
- [Smith] said to [the Grievant], "Let's go to the backroom to wrestle."
- [The Grievant] said, "No."
- [Smith] pushed [the Grievant] said, "Let's go."
- Later, [Smith] told Mr. Standifer that [the Grievant] and Mr. Tate, while playing with him, "jumped" him and choked him "and stuff."
- According to [Doe] Mr. Standifer laughed.
- [Doe] thinks that [another student] was present but is not sure.
- Mr. Standifer was not in the room.

Doe also testified that while he and the Grievant were in the backroom, Doe tried to pick up the Grievant and slam him but could not because the Grievant was too big. On cross-examination, Doe testified that the Grievant did not do anything to hurt him, that he did not threaten Doe, that they were just "joking around," that the Grievant was nice to him, that he was "a cool teacher" and that they were not really wrestling. Doe demonstrated what he meant when he had said that he and the Grievant put each other in "headlocks." That demonstration showed that they merely stood side by side and each put an arm around the neck and lower part of the head of the other without any pressure -- what I would describe as a fake headlock. On re-direct examination, Doe testified as follows:

- Q Now, [Doe] did you like doing things like headlocks and wrestling with [the Grievant]?
A It was just goofing around I think because I like to fight.
Q You thought that was fun, didn't you?
A Yeah.
Q And so you thought those types of activities were okay and were cool.
A Yes.
Q And did you like [the Grievant]?
A Yes.

When asked about the incident with Smith described in Boyd's notes as occurring "on a different occasion," Doe testified that he was not in the classroom at the time and that he was describing to Boyd what Smith and other students told him.

Barnes also gave testimony I summarize as follows. At the meeting on February 1, 2008, among the Grievant, Barnes, Tramel, Vickerman, and Kerfeld, at which the Grievant was told he would be discharged, the Grievant tried to explain that he

had a good relationship with the students. Barnes testified that the Grievant said "he would take the kids out to lunch and out to basketball games," activities that the Employer's representatives had not been aware of. Barnes testified that it was not appropriate for a Paraprofessional to have such social interactions with students because it created "boundary issues" and that EBD students need a consistent message that teaches them how to "manage and interact in these kind of social situations, and for the consistent message to be that there are boundaries, there are professional boundaries and social boundaries as a paraprofessional that these folks don't cross and these kids don't cross."

Above, I have set out the reasons alleged in support of the Grievant's discharge, as described in the testimony and investigative notes of representatives of the Employer -- the reasons alleged as of February 6, 2008, the date the School Board took action discharging him.

Kerfeld testified that the Union, by its appropriate committee, considered whether to challenge the Grievant's discharge by grievance and decided not to do so.

Nevertheless, on March 3, 2008, the Grievant initiated the present grievance by letter to the School Board from his attorney, David L. Shulman, using the grievance procedure established by Article IX the labor agreement between the Employer and the Union. The grievance alleges that the Employer did not have just cause to discharge the Grievant. The parties agree that the primary substantive issue presented in this

proceeding is whether the Employer had just cause to discharge him. The grievance also alleges that the Employer's investigation was insufficient and that, therefore, the Grievant was deprived of due process. In addition, the Grievant alleges that the Employer failed to follow the grievance procedure established by Article IX of the labor agreement.

After the grievance was initiated, the Employer alleged two additional reasons for the Grievant's discharge, both of which were made known to the Grievant at or just before the hearing in this matter. First, Tramel testified that on about March 7, 2008, he checked records kept by North View that show the times when the Grievant entered the building on work day mornings between early December of 2007 and late January of 2008. He concluded from those records that the Grievant entered the building several times during that period after the start of his work day.

Second. At the hearing, Erica L. Heath, a North View mainstream Teacher, testified that her notes from a class given on December 13, 2007, show the following:

Had to tell [the Grievant] not to twist [Smith's] arm behind his back or hit/tap him on the head.

The Employer also presented the following typed note, referring to the same incident, which bears the handwritten date "5-29-08" and is signed by Heath:

During the beginning of class during instruction I looked to the back of the room to see [the Grievant] take one of his students [Smith], twist his arm behind his back and press his head down against the table, the student was calling out. I stopped instruction and told [the

Grievant] "We don't put our hands on students here, you need to stop that." I reported this to Jerri Johnson [North View's Special Education Building Coordinator] as I was concerned about this behavior.

I also shared with her that [the Grievant's] students had reported to me at least 4 times that they had been hit by him while in the hallway and/or when they were in their self-contained classroom. When these incidents were reported to me I advised the students that they needed to go to the office and report this to the counselor or an administrator because it is not okay for a teacher to hit them. I offered to give them a pass to go make a report -- and I let them know if something happened in the hallway it would be on tape. Each time the students retracted their statement and refused to make a report because they didn't want to be a snitch or to get their teacher in trouble.

Sue Hochstaetter also reported that during work time she looked up to the front of the room to see [the Grievant] play fighting/rough housing with one of his students. She shook her head and told him, "You need to stop that."

Heath testified that, at the time of the December 13, 2007, incident described above, she reported the Grievant's conduct to Jerri L. Johnson, North View's Special Education Building Coordinator, but not to school administrators.

Johnson testified as follows. Standifer's Classroom was a Setting III classroom, i.e., one that serves students who need special education support at least 60% of the time and, for that reason, spend most of their time in that "more restrictive setting." Typically, EBD students may withdraw, may act out, may act impulsively or aggressively, and often have difficulty "in making friendships or relationships to peers or staff." A Paraprofessional's responsibilities include supporting the learning of the students and helping "with the behavioral aspects" within the special education classroom. When a student goes to a mainstream classroom, the Paraprofessional accompanies the student, to help with learning, to make sure that the

that the student is on task, and to provide some behavioral support to the mainstream teacher and help the student in the development of social skills.

Johnson testified that a Paraprofessional's "physical interaction" with a student would not be appropriate, except to protect the student or to protect other students and staff. She testified that it would not be appropriate for a Paraprofessional to wrestle with a student or to put the student in a headlock or to twist a student's arm and "push his head down on a table." The proper way to confront a student's inappropriate behavior is to do so with spoken instruction and reminders, or, if such behavior arises in a mainstream classroom, with a return to the student's special education classroom.

Johnson testified that she did not have "absolute recollection" whether she told Heath to inform school administrators about her observation of the Grievant's conduct on December 13, 2007, but Johnson said that she usually gives that advice when a Teacher tells her of such an incident. Johnson did not report the incident to school administrators, nor did she discuss the report with the Grievant.

Johnson also testified that it would not be appropriate to take a student to lunch "off campus" unless with permission of the student's parents.

Below is set out the Employer's Policy 507, the policy on "Corporal Punishment":

- I. Prohibition. In accordance with M.S. 127.45, Subd. 1, all District employees or agents are prohibited from inflicting corporal punishment or causing

corporal punishment to be inflicted upon a student to reform unacceptable conduct or as a penalty for unacceptable conduct.

- II. Permitted Restraint. In accordance with M.S. 609.379, Subd. 1, reasonable force may be used upon or toward the person of a student without the student's consent when used by a District employee or agent in the exercise of lawful authority or to restrain a student from self-injury or injury to any other person or property.
- III. Reporting. Any District employee or agent who employs or observes employed corporal punishment or physical restraint upon a student will report the incident in accordance with Policy 507 - Corporal Punishment.

I summarize the Grievant's testimony as follows. His primary duties in Standifer's Classroom were to help students with questions they may have about homework assignments and to assist them toward appropriate behavior. When he accompanied a student to a mainstream classroom, he assisted the student in understanding the instruction and he tried to assure that the student was "not a disruption in the mainstream classroom."

The Grievant testified that he had never wrestled with Doe, put him in a headlock or engaged in play-fighting with him, and he testified that he had never engaged in such conduct with Smith or any other student. He denied Heath's allegation that, in her mainstream classroom on December 13, 2007, he had twisted Smith's arm behind his back and placed his head down on the table. He testified that Smith is physically active and easily distracted and that Smith's tendency to move around sometimes required him to place a hand on Smith's shoulder to calm him down. He also testified that Heath had never spoken to him about his treatment of Smith, and he denied that he had engaged in roughhousing or play-fighting with students as Heath reported she heard from Hochstaetter, a Paraprofessional.

The Grievant denied that he was often late at the start of the work day -- explaining 1) that sometimes, when students were scheduled for a field trip, he had to pick up a District-owned van and drive it to North View, thus arriving at North View after his usual start time, 2) that he sometimes entered the unsecured front door of the building or, if at a secured door, entered as another employee used the security card that opened the door, and 3) that he had permission from Standifer to work through his thirty-minute duty-free lunch period and adjust his start time accordingly.

The Grievant also explained that, sometimes, as a reward for good behavior, Standifer or he bought lunch for the class when they were on field trips, and he described an occasion when a student asked to attend a high school basketball game and, as the team's coach, he agreed to the request with the permission of the student's mother, as a reward for the student's recent improvement in mathematics.

The Grievant testified that he had no specific recollection of the incident described by Heath in her classroom on December 13, 2007. He said that Heath may not have seen clearly what was happening. The Grievant also testified that Smith sometimes picks fights with other students, that he has been suspended from school several times for such conduct and that he has been required to restrain Smith in order to prevent injury to Smith or others he fights with. He conceded that he has had to restrain Smith or other students dozens of times because of such behavior.

The only evaluation of the Grievant's performance was done on November 21, 2006, by Standifer and Tramel. The evaluation gives him the top rating in all rating categories, with the following comments:

Punctuality: [The Grievant] takes his position very seriously and conducts himself in a professional manner, always following up on work covered the day after an absence.

Sensitivity to Diversity: Always professional and respectful.

General Competence: Works well with all students and staff.

Productivity: Outstanding. Highly competent.

Pride in Work: Excellent.

Initiative/Communication/Cooperation: Great communicator with staff and students. Always makes the teacher aware of students needs and behavioral issues.

Additional Supervising Administrator(s) Comments: Great team member!

The Grievant testified that he had "very good relationships" with all the students in his classroom and that no one ever informed him that his treatment of students was improper until, on January 29, 2008, he learned about the investigation that led to his discharge. He testified that, until then, he had never received a complaint about his treatment of students. He has never previously been disciplined by warning, suspension or otherwise.

DECISION

Procedural Issues.

Article IX, Section 5, of the labor agreement between the Employer and the Union establishes several steps in the procedure for processing grievances -- by informal discussion,

by an appeal to a School Board designee at Level I, by an appeal to the Superintendent of Schools at Level II, and by an appeal to the School Board at Level III. Though the Employer's early investigation and discussions with the Grievant might be interpreted as an "informal discussion," it is clear that the Employer did not hold meetings or give written decisions in response to appeals by the Grievant.

The Grievant argues that the failure of the Employer to act at the advanced steps of the grievance procedure should result in a forfeiture of its defense to the grievance -- as a failure to comply with the grievance procedure established by Article IX. The Employer invokes Section 7 of Article IX, which provides:

Failure by the School Board or its representatives to issue a decision within the time periods provided herein will constitute a denial of the grievance and the employee may appeal it to the next Level.

The Grievant also argues that the failure to hold meetings and make written decisions in the process of appeals established in Article IX deprived him of due process.

I make the following rulings with respect to the Grievant's procedural arguments. First, Article IX, Section 7, of the labor agreement means that, as the Employer argues, even if the Employer decides not to act at any step in the grievance procedure, that decision is to be interpreted as a denial of the grievance. Accordingly, I rule that there has been no defect in compliance with the grievance procedure that would forfeit the Employer's right to defend against it.

Second. It seems clear that, if the Employer had used at least one of the meeting steps in the levels of appeal established by the grievance procedure, the grievance process would have run more smoothly, and it is possible that such a meeting might have assisted the Employer to a fuller understanding of the Grievant's conduct. Nevertheless, I rule that the process in its entirety, i.e., including the full evidentiary hearing before me, was sufficient to provide the Grievant with due process -- a fair opportunity to rebut the allegations against him.

Just cause and progressive discipline.

In post-hearing argument, the parties have suggested several definitions of "just cause." The following discussion, gives a fair summary of what is "just cause" as defined in American labor law. The essence of the employment bargain between an employer and an employee (or a union representing an employee) is that the employer agrees to provide the employee with pay and other benefits in exchange for the agreement of the employee to provide labor in furtherance of the employer's enterprise. When the employer and the employee (or a representing union) have also agreed that the employer may not terminate the employment bargain except for "just cause," they intend that discharge will not occur unless the employee fails to abide by the agreement to provide labor in a manner that furthers the employer's enterprise.

In previous cases, I have used the following two-part test of "just cause," which derives from that intention:

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 enterprise. Some conduct may create such a threat to the enterprise 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 to an employer that the employer should not be required to risk its repetition. For example, an employer should not be required to use training and corrective lesser discipline in an effort to eliminate the chance of repetition for most thefts, for drug use in circumstances that threaten the safety of others or for insubordination so extreme that it undermines the employer's ability to manage its operations.

Some misconduct or poor performance is only a slight hindrance to good operations. For example, a single instance of tardiness will not have a significant adverse effect on the operations of most employers. Conduct, however, that is only slightly adverse when it is infrequent, may have a significant

adverse effect on operations if it occurs often. Thus, tardiness and absence that become chronic will usually cause a serious disruption to operations, and, if progressive discipline does not eliminate such poor attendance, it will accumulate in its adverse effect and constitute just cause for discharge.

Similarly, an isolated instance of poor work performance will not, in most circumstances, have a significant adverse effect on an employer, but poor performance that persists, even after a reasonable effort to correct it, will undermine the essence of the employment relationship -- that, in exchange for wages and benefits, the employee will provide the employer with satisfactory work in furtherance of the enterprise.

In the present case, I apply these principles as follows. First, the evidence shows that the primary charge against the Grievant as of the time of his discharge was that, on one occasion he had taken Doe to the storage room in Standifer's Classroom and had "wrestled" with Doe and placed him in a "headlock." The early investigation seems also to have determined that the Grievant engaged in similar conduct with Smith, though the understanding of the Employer's representatives about that conduct was less specific. In addition, the early investigation determined that the Grievant inappropriately purchased lunches for students and took one student to a basketball game.

In addition to these allegations of misconduct, made at the time of the discharge, two others were made after the discharge, both based on conduct alleged to have pre-existed the

discharge -- that the grievant was often late for the start of the work day and that he had applied unreasonable physical restraint to Smith in Heath's classroom on December 13, 2007.

The Grievant argues that I should not consider these additional allegations because they were not included as reasons for the original decision to discharge him and are thus outside the scope of this proceeding. For two reasons, however, I have decided to consider not only the allegations made at the time of the discharge, but those made later. I do so to provide the parties with a final disposition of all charges of misconduct alleged to have occurred before the date of the discharge. In addition, I do so, at least with respect to the allegation that the Grievant restrained Smith with unreasonable force in Heath's classroom, because that allegation can be viewed as one which, if sustained, may be corroborative of the original allegations of inappropriate physical contact with Doe and Smith.

I make the following rulings. First, the evidence does not support the allegation that the Grievant was often late for the start of the work day without permission. The explanations he gave in his testimony, described above, indicate 1) that he had permission for a later arrival at North View on days when he picked up the District's van for use on field trips, 2) that he had permission to arrive later as an offset to working through his lunch period, or 3) that the Employer's recordings of entries into the building are incomplete.

Second. The evidence does not show that the Grievant acted inappropriately when he purchased lunches for students or

when, on one occasion, he granted the request of a student to watch a basketball game he was coaching. I accept Barnes' testimony that a special education Paraprofessional should maintain boundaries that preserve the EBD student's understanding that the Paraprofessional serves a professional and not a social function in the student's life. Nevertheless, it appears from the evidence that the Grievant acted within the limits of acceptable conduct, as described by Johnson and other witnesses for the Employer -- that his purchase of lunches on field trips as a reward for good behavior was appropriate and that his granting the request of a student to attend a basketball game with the consent of a parent, as a reward for recent good work in mathematics, was also appropriate.

Third. I reach the following conclusions about the visit made by Doe and the Grievant to the storage room in Standifer's Classroom. Doe's testimony about, and his demonstration of, what he had called "wrestling" and "headlocks" during the Employer's investigation, show that he and the Grievant were playing a joke for the class. They made noises that simulated the physical contact of wrestling, they placed "fake" headlocks, around their necks, as Doe's demonstration showed, and they then came out of the storage room laughing at their joke.

The most serious allegation against the Grievant arose about four months after the decision to discharge him -- that, as Heath testified, he twisted Smith's arm behind his back and pressed his head onto the table in front of him as they attended Heath's mainstream classroom on December 13, 2007. As I

understand the Grievant's testimony responding to Heath's testimony, he had no specific recollection of that day, but he thought that Heath would have had a limited opportunity to observe because he and Smith would have been at the back of the classroom. The Grievant also testified that, because Smith had a tendency to fight with other students, he sometimes found it necessary to restrain Smith within the limits permitted by Policy 507 -- to prevent harm by the student to himself or others.

I accept Heath's testimony about what she observed. That account of her observation is supported not only by her detailed note made in May of 2008, but by her report of that observation to Johnson and by her class notes, apparently made contemporaneously. The evidence includes no indication that Heath would falsely report her observation. Though I would not make a finding of such behavior based solely on hearsay evidence, I note that Heath's hearsay report of what students reported about the Grievant's conduct in the hallways tends to corroborate her testimony about her observation of December 13, 2007.

I understand and accept the testimony of Barnes, Johnson and other witnesses for the Employer that they found even the simulation of wrestling, or "play-fighting," to be inappropriate to the Paraprofessional's proper goal when teaching EBD students because such a simulation may indicate acceptance of aggressive behavior, by treating it as a humorous subject. Indeed, Barnes testified that the Grievant's behavior toward Doe violated the Employer's corporal punishment policy, not because it caused or

was intended to cause physical harm to Doe, but because it caused him emotional harm. Implicit in the testimony of the Employer's witnesses about the Grievant's play-wrestling, known to them for the first time as they decided on February 1, 2008, to discharge him, is that they considered such conduct so adverse to the Employer's operations, that he should be discharged without first using lesser discipline.

The evidence, however, does not show that the Grievant was aware that play-wrestling with EBD students was inappropriate to their treatment. Though the Grievant knew about Policy 507 on Corporal Punishment and its prohibition of emotional harm, there is no indication that he knew that play-wrestling would be emotionally harmful to an EBD student or that, even aside from the requirements of Policy 507, he knew or should have known that play-wrestling was not appropriate. Rather, the Grievant's excellent performance, as shown on his performance evaluation of November, 2006, at least implies that he did not intend to engage in inappropriate teaching, but thought that such conduct would improve his relationship with the students and his ability to influence their behavior in a positive way.

The Grievant's good record of performance and his lack of previous discipline indicate that his misconduct -- both the inappropriate play-wrestling with Doe and Smith and the application to Smith of an apparently excessive restraint on December 13, 2007 -- were amenable to correction by progressive discipline. I conclude 1) that the Employer did not have just

cause to discharge the Grievant, 2) that a warning was appropriate discipline to indicate to him that play-wrestling is not a proper teaching method for EBD students and 3) that a suspension of thirty calendar days is appropriate discipline for the application to Smith of an excessive restraint.

I note that, after the hearing, the attorneys for both parties sent me documents that they alleged to be relevant. The attorney for the Grievant sent me the decision in an arbitration proceeding that challenged Tate's discharge for conduct similar to that alleged in this case against the Grievant, and the attorney for the Employer sent me a document showing that a witness for the Grievant had been recently charged with a crime. Each attorney objected to the late submission of the document sent by the other as untimely and irrelevant. I have not considered either submission because I agree with both -- that the documents are irrelevant.

Remedy.

The Grievant's usual work week as a Paraprofessional was thirty hours during the school year. In addition, he worked as a coach or an assistant coach at one of the high schools operated by the Employer. The Employer argues that those coaching positions were "at-will" positions, i.e., were subject to the Employer's right to change the incumbent at any time and for any reason without showing cause for doing so. The Employer urges that, therefore, an award of back pay should not include the stipends the Grievant received for coaching. The record does not show that the Grievant was protected from discontinuance of

his coaching positions except for just cause, and, accordingly, I do not include the coaching stipends in the award of back pay.

AWARD

The grievance is sustained in part. The Employer shall reinstate the Grievant to his position without loss of seniority. The Grievant's disciplinary record shall reflect, in lieu of his discharge, a disciplinary warning and a disciplinary suspension of thirty calendar days without pay.

The Employer shall pay the Grievant back pay for the wages and benefits he would have received since his discharge, less the wages and benefits attributable to the period of his disciplinary suspension. Because the Grievant was under a duty to mitigate his damages, the amount of back pay shall be reduced by compensation he received or could have received by a reasonable exercise of that duty during the days of the school year he would have been working for the Employer as a Paraprofessional, if he had not been discharged. For the reasons given above, the award of back pay shall not include loss of the stipends the Grievant might have received from the Employer for coaching. I retain jurisdiction to resolve disputes that may arise about the amount of back pay.

March 23, 2009


Thomas P. Gallagher, Arbitrator