

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



SEP 17 2018

[REDACTED])
Petitioner)
)
)
v.)
)
)
PROFESSIONAL STANDARDS)
COMMISSION,)
Respondent)

Docket No.: [REDACTED]
[REDACTED]

Agency Reference No.: [REDACTED]

Kevin Westray
Kevin Westray, Legal Assistant

FINAL DECISION

I. SUMMARY OF PROCEEDINGS

[REDACTED] ("Petitioner") appeals a decision by the Professional Standards Commission ("Respondent" or "Commission") to suspend Petitioner's teaching certificate for twenty days due to alleged violations of the laws, rules and regulations governing the teaching profession in Georgia.

The evidentiary hearing in this case took place on July 20, 2018, before the undersigned administrative law judge at the Office of State Administrative Hearings, 225 Peachtree Street, NW, Atlanta, GA 30303. Petitioner appeared and was represented by Robert G. Rubin, Esq. Respondent was represented at the hearing by Brittanie D. Browning, Esq., Assistant Attorney General.

At the conclusion of the hearing in this matter, the record was held open until August 15, 2018 in order to permit the parties to submit post hearing written closing. The transcripts from the hearing in this matter were received by the calendar clerk for the Office of State Administrative Hearings on August 6, 2018. On August 15, 2018, the parties submitted their post hearing briefs at which time the record in this case closed.

After consideration of the evidence and the arguments of the parties, and for the reasons stated below, Respondent's decision to sanction Petitioner with respect to his Georgia teaching certificate is **REVERSED**.

II. FINDINGS OF FACT

1. [REDACTED] ("Petitioner") holds a teaching certificate in the State of Georgia and held such certificate at all times relevant to the matters in this case. (Statement of Matters Asserted ("Matters Asserted") ¶ 1; see Ex. R-3.)
2. In 2016, Petitioner was employed by Atlanta Public Schools as a substitute working with special needs students. As part of his duties, Petitioner assisted in getting students onto the bus. (Matters Asserted ¶ 2; Answer of Petitioner [REDACTED] ("Answer") ¶ 2.)
3. On December 7, 2016, Petitioner assisted an autistic, non-verbal elementary student onto a school bus driven by Ms. [REDACTED]. This student did not cooperate in getting on the bus and allowing Petitioner to fasten his harness to the seat. (Matters Asserted ¶ 3; Answer ¶ 3.)
4. Based upon its investigation, Respondent alleges that Petitioner hit the student's buttocks to get the student onto the bus and roughly handled the student while getting the student into his seat on the bus. (Matters Asserted ¶ 4.) Petitioner denies such conduct occurred. (Answer ¶ 4.)
5. Petitioner's alleged conduct in connection with the events on December 7, 2016 (the "Incident") is the basis for Respondent's proposed disciplinary actions for infractions of Rule 505-6-.01(3)(b) [Conduct with Students] and Rule 505-6-.01(3)(j) [Professional Conduct] of the Rules of the Professional Standards Commission. (Matters Asserted ¶ 5.) Based upon its examination, Respondent proposed that Petitioner have his teaching certificate suspended for twenty days as a sanction for his conduct. (Testimony of Pumphrey, Tr. p. 106.) David Pumphrey, Chief Investigator for the Commission, testified a twenty day suspension is consistent with other sanctions issued by the Commission for educators similarly situated to Petitioner. (Testimony of Pumphrey, Tr. p. 107.)
6. The details of the facts surrounding the Incident are disputed in a number of particulars. Four eye-witnesses to the alleged Incident testified at the hearing on this matter: [REDACTED] the bus-driver (Tr. pp. 13-49); [REDACTED] the monitor who works on the bus with Ms. [REDACTED] (Tr. pp. 51-99); Petitioner (Tr. pp. 118-215); and [REDACTED] a paraprofessional who was working with Petitioner on the day of the Incident (Tr. pp. 224-288). In true *Rashomon* fashion, each of the four witnesses has a differing perception and recollection of the events of the Incident.
7. A number of video cameras are located on the bus and the facilities of the Adamsville Elementary School where the Incident occurred. The video cameras are supposed to be operated for security purposes and to record events such as the Incident. But, of course, none of the cameras on the bus was working on the date of the Incident, and nobody pulled the hallway video footage, which is only stored for about a week. (Testimony of [REDACTED] Tr. pp. 46-48; Statements of Mr. Rubin and Testimony of [REDACTED] Tr. pp. 209-223; Testimony of [REDACTED] Tr. p. 324.)
8. The child who is at issue in this case, and who will be referred to as S.F., was five years old at the time of the Incident. (Testimony of [REDACTED] Tr. pp. 14-15.) S.F. is an autistic, non-verbal special needs child. (Testimony of [REDACTED], Tr. p. 25; Ex. P-24.) S.F. is normally a cheerful and loving child and is well liked by those working with him. (Testimony of [REDACTED] Tr. pp. 14-15, 24; Testimony of [REDACTED], Tr. p. 52; Testimony of [REDACTED], Tr. p. 267.) At the time of the Incident, S.F. was approximately three and a half feet tall and weighed well in excess of one hundred pounds. (Testimony of [REDACTED] Tr. pp. 14, 37.) It is undisputed that S.F. was so heavy that the female teachers and staff

at Adamsville Elementary could not pick him up unassisted. (Testimony of [REDACTED], Tr. pp. 26-27; Testimony of Petitioner, Tr. p. 127.)

9. S.F. has "good days" and "bad days." Getting on and off the bus, particularly at the end of the school day, is frequently particularly difficult for S.F. (Testimony of [REDACTED], Tr. p. 25; Testimony of Arnold, Tr. p. 64; Testimony of [REDACTED], Tr. pp. 236-237, 241-244; Testimony of Petitioner, Tr. p. 130.)

10. When S.F. does not wish to do something, in the words of Ms. [REDACTED] S.F. "falls out." That is to say, S.F. goes limp and uses his considerable heft as dead weight to resist doing things that he does not wish to do. (Testimony of [REDACTED], Tr. p. 26; Testimony of [REDACTED], Tr. pp. 234, 236-238.)

11. S.F.'s "falling out" behavior is particularly frequent in connection with boarding the bus at the end of the day. (Testimony of [REDACTED], Tr. pp. 25-26; Testimony of [REDACTED], Tr. pp. 234-235.) Teachers, paraprofessionals and support personnel at Adamsville Elementary routinely worked as a team to get S.F. onto the bus. (Testimony of [REDACTED], Tr. p. 27; Testimony of [REDACTED], Tr. pp. 236-257, 268.) This entails essentially carrying S.F. or holding him up by standing behind him, reaching arms under his armpits, "waddling" him to the bus by pushing his legs with the legs of the person assisting him and maneuvering him up the bus stairs to his seat. (Testimony of Petitioner, Tr. pp. 162-165.)

12. Petitioner demonstrated visually at the hearing how he performed moving S.F. to the bus. Colloquially, one might describe this as "dragging" S.F. onto the bus, which is the way Ms. [REDACTED] described it in her written statement (Ex. R-1), but that is not an accurate characterization. (Testimony of [REDACTED], Tr. p. 33.) It is more accurately described as an assisted walk or "waddling" with S.F.. This was normal and recurrent behavior with S.F. (Testimony of [REDACTED], Tr. p. 36; Testimony of Moore, Tr. pp. 236-238.) Based upon the demonstrations given by Petitioner in the courtroom, the method used to move S.F. that day is similar to the way one would assist someone who has weakness in their legs due to injury or intoxication and cannot walk unassisted. It should be noted that Petitioner is of a tall and slender build. Moving over one hundred pounds of dead weight would require great effort by Petitioner. (Testimony of Petitioner, Tr. pp. 162-165.)

13. Because of his special needs, S.F. wears a safety vest and harness when riding in the school bus so that he can be strapped into his seat in the bus. This is both for S.F.'s own safety and for the safety of others. (Testimony of Asemota, Tr. pp. 33-34, Testimony of Petitioner, Tr. p. 162.) The safety vest is clipped into harness on the back of the seat using carabiner clips. S.F. has to be strapped and clipped in by teachers and staff, as he is not capable of doing this himself. S.F. normally rides on the right side of the bus, in the first seat, which is to the right and behind where the bus driver sits. (Testimony of [REDACTED], Tr. p. 54; Testimony of [REDACTED], Transcript, p. 40.)

14. On the day of the Incident, Petitioner was substitute teaching for Ms. [REDACTED] [REDACTED] on and was working with Ms. [REDACTED], who was serving as the paraprofessional in Ms. [REDACTED]'s class, as well as for another teacher, Ms. [REDACTED]. (Testimony of Moore, Tr. pp. 228-229, 246.)

15. On the day of the Incident, Petitioner and Ms. [REDACTED] were working together to get S.F. to the bus. (Testimony of [REDACTED], Tr. p. 246; Testimony of [REDACTED], Tr. p. 54). At the end of the day, S.F. was having a particularly "bad day." Although S.F. was being particularly difficult, his behavior was not unusual except as to degree of difficulty. (Testimony of [REDACTED], Tr. pp. 25, 54; Testimony of [REDACTED], Tr. pp. 241, 269). Petitioner and Ms. [REDACTED] literally had their hands full and were struggling to get S.F. to the bus and get him strapped in. (Testimony of Arnold, Tr. p. 54; Testimony of [REDACTED], Tr. pp. 252-254; Testimony of Petitioner, Tr. p. 163.)

16. In the face of conflicting testimony as to the details of the Incident, observations about the testimony of the four eye witnesses are in order.

a. Of the four eye-witnesses, the testimony of Ms. [REDACTED] is the least credible. There are a number of inconsistencies and apparent factual errors in her testimony. For instance, she testified that Petitioner was present and worked with S.F. on bus duty on December 6, 2016, the date prior to the Incident. The evidence, however, shows that in fact Petitioner was not present for bus duty that day. (Testimony of [REDACTED] Tr. pp. 66-68; Testimony of Petitioner, Tr. p. 141; Testimony of [REDACTED] Tr. pp. 276-277.) Moreover, Ms. [REDACTED] was so upset by the situation on the day of the Incident that she moved to the back of the bus and did not witness the entire event. (Testimony of [REDACTED] Tr. p. 17; Testimony of [REDACTED] Tr. pp. 55.) Finally, Ms. [REDACTED] is emotionally close to S.F. and was particularly distressed by the situation on the day of the Incident, becoming visibly upset during her testimony. (Testimony of [REDACTED] Tr. p. 88.) One has the sense that Ms. [REDACTED]'s memory of the events of the Incident may have been affected by her distress at seeing S.F. so upset. Indeed, her testimony that S.F. made a statement to her regarding the Incident (Testimony of [REDACTED] Tr. pp. 94-99) is simply not credible because S.F. is a non-verbal autistic child who is incapable of speaking in sentences. (Testimony of Petitioner, Tr. p. 125; Testimony of [REDACTED], Tr. pp. 233-235.)

b. The testimony of Ms. [REDACTED], which is at the core of Respondent's findings as the basis for discipline in this case, is equivocal in certain key particulars. For instance, she was not clear in her testimony whether Petitioner in fact "popped" S.F. on the leg, although she had stated that Petitioner had done so in her written statement. (Testimony of Asemota, Tr. pp. 43-44; Ex. R- 1.)

c. The testimony of Petitioner was persuasive and candid but must be weighed in light of his strong self-interest. (Testimony of Petitioner, Tr. pp. 118-201.)

d. The testimony of Ms. [REDACTED] is particularly credible and detailed. Ms. [REDACTED] is the most disinterested witness, she was there for the entire incident, she has a prior history of working with S.F. and her testimony at the hearing was candid and straightforward. During the hearing, Ms. [REDACTED] was asked the following question: "So, based on your training and experience and, as a mandated reporter, did you ever see Mr. [REDACTED] act inappropriately with S.F.?" Her answer, "no," summarizes her testimony in a nutshell. (Testimony of [REDACTED], Tr. p. 262.)

17. Without resorting to a detailed and ultimately fruitless exegesis of the precise words and phrases used by the several witnesses at various times in their respective testimony to describe what happened, it seems reasonably clear that, on the day of the Incident, Petitioner had direct physical contact with S.F. as Petitioner struggled to get S.F. on the bus. Exactly how Petitioner "tapped," "popped," "patted," "hit," "touched" or "spanked" S.F. is unclear. After reviewing and weighing all of the evidence and testimony, the undersigned finds that on this score the testimony of Ms. [REDACTED] and her demonstration in the court room of what Petitioner did most persuasive. As such, the undersigned concludes that what Petitioner did was what the undersigned would characterize as "tapping" or "patting" of S.F. in an attempt to direct S.F.'s attention and to motivate him to move. It is what one would reasonably do in order to coax or direct a non-verbal child who is passively resisting direction

by going limp. A preponderance of the evidence at the hearing shows that Petitioner had to struggle to get S.F. into his seat on the bus that day and that Petitioner had to use all his strength to get S.F. to the bus and then to push S.F. up into his regular seat in order to get S.F. buckled in. (Testimony of [REDACTED] Tr. pp. 252-289.)

18. Stated negatively, a preponderance of the evidence does not show that Petitioner “spanked” or “hit” S.F. or that Petitioner “threw” or “dropped” S.F. into his seat or that Petitioner “hit S.F. on the buttocks” to get S.F. onto the bus or “roughly handled” S.F. while getting S.F. onto the bus.

III. CONCLUSIONS OF LAW

1. The Commission seeks to impose a twenty day suspension with respect to Petitioner’s certificate. Therefore, the Commission bears the burden of proof in this matter. Ga. Comp. R. & Regs. 616-1-2-.07(1). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

2. The Commission has the ability to sanction teachers’ and paraprofessionals’ certificates for violating the Code of Ethics for Educators. O.C.G.A. § 20-2-984.5. The duty of the Commission is to ensure the welfare of students in Georgia public schools. “The Code of Ethics for Educators defines unethical conduct justifying disciplinary sanction and provides guidance for protecting the health, safety and general welfare of students and educators, and assuring the citizens of Georgia a degree of accountability within the education profession.” Ga. Comp. R. & Regs. 505-6-.01.

3. Based on its investigation, the Commission found probable cause that the Educator violated the Code of Ethics for Educators. In particular, he violated Standard 2 [Conduct with Students] and Standard 10 [Professional Conduct]. Standard 2 requires that when interacting with students, “An educator shall always maintain a professional relationship with all students, both in and outside the classroom.” Ga. Comp. R. & Regs. 505-6-.01(3)(b).¹ Standard 10 provides,

An educator shall demonstrate conduct that follows generally recognized professional standards and preserves the dignity and integrity of the education profession. Unethical conduct includes but is not limited to any conduct that impairs and/or diminishes the certificate holder’s ability to function professionally in his or her employment position, or behavior or conduct that is detrimental to the health, welfare, discipline, or morals of students.

Ga. Comp. R. & Regs. 505-6-.01(3)(j).

4. The Commission has to make its decisions in its deliberations based upon the results of investigations and written reports. As such, it does not have the benefit of eyewitness testimony in its proceedings and is not able to make credibility assessments of the testimony and statements of various witnesses. Certainly, if one concluded that Petitioner had in fact “hit the student’s buttock’s to get onto the bus and roughly handle[d] the student while getting him into his seat”, the Commission’s finding of probable cause and proposed sanction in this matter would be appropriate.

¹ Code of Ethics for Educators effective date June 15, 2015, which were in place at the time of the incident.

5. The absence of video evidence in this matter is frustrating, as the whole purpose of such systems is to minimize the need to rely on fallible memories. In such absence, we are left with the testimony of the eyewitnesses in this hearing. The frailties of memory and eye witness testimony are well documented. It is not surprising that witnesses have differing memories of the Incident. As Respondent correctly noted in its briefs, the decision in this case is a credibility issue and turns on the accuracy of the impressions and memories of the witnesses.

6. The evidence shows that Petitioner was in effect wrestling with a one hundred pound child that was using his dead weight to thwart Petitioner's efforts to get the child into the bus and into the proper seat. A preponderance of the evidence does not support the conclusion that Petitioner "hit the student's buttocks to get the student onto the bus and roughly handled the student." To the contrary, a preponderance of the evidence fully supports Ms. [REDACTED]'s conclusion that there was nothing in Petitioner's conduct that constituted a reportable incident and grounds for disciplinary action.

7. Therefore, Respondent has failed to show by a preponderance of the evidence a basis for imposition of a sanction of suspension of Petitioner's certificate.

IV. DECISION

Accordingly, Respondent's decision to sanction Petitioner by the imposition of a twenty day certificate suspension is **REVERSED**.

SO ORDERED, this 17th day of September, 2018.

Charles R. Beaudrot

Charles R. Beaudrot
Administrative Law Judge

