IN THE MATTER OF THE ARBITRATION	)	OPINION AND AWARD
	)	
Between	)	**RONALD F. TALARICO, ESQ.**
	)	**ARBITRATOR**
TUSCARORA SCHOOL DISTRICT	)	
	)	
and	)	
	)	
TUSCARORA EDUCATION ASSOCIATION	)	

GRIEVANT

Sean Scanlon

ISSUE

Discharge

HEARINGS

October 21, 2015
November 23, 2015
December 23, 2015
Mercersburg, Pennsylvania

POST-HEARING BRIEFS

Received by March 10, 2016

APPEARANCES

For the District
Carl P. Beard, Esq.
ANDREWS & BEARD

For the Association
Thomas W. Scott, Esq.
KILLIAN & GEPHART

ADMINISTRATIVE

The undersigned Arbitrator, Ronald F. Talarico, Esq., was mutually selected by the parties to hear and determine the issues herein. Evidentiary hearings were held on October 21, November 23, and December 23, 2015, in Mercersburg, Pennsylvania, at which time the parties were afforded a full and complete opportunity to introduce any evidence they deemed appropriate in support of their respective positions and in rebuttal to the position of the other, to examine and cross examine witnesses and to make such arguments that they so desired. Post-hearing briefs were received from both parties by March 10, 2016 at which time the record was closed. No jurisdictional issues were raised.

PERTINENT CONTRACT PROVISIONS

ARTICLE IV
RIGHTS OF PROFESSIONAL EMPLOYEES

Section 4.7 Discipline

No professional employee shall be disciplined, reprimanded in writing, reduced in rank or compensation, or dismissed without just cause.

BACKGROUND

The Employer is the Tuscarora School District, located in Mercersburg, Pennsylvania ("District"). The Tuscarora Education Association ("Association") is the exclusive bargaining agent for non-supervisory professional personnel, including teachers, counselors, nurses, Dean of Students and like work. The bargaining unit excludes all non-professional employees, supervisors, first level supervisors, and confidential employees. The District and Association

have been parties to a series of collective bargaining agreements over the years, the most recent of which was extended through the 2013 – 2014 academic year.

The Grievant, Sean Scanlon, recently entered the teaching profession after a first career in the field of agriculture extension services. The District hired him just a few days prior to the start of the 2014–2015 school year. On December 17, 2014, just over three months into his career as a shop teacher with the District, the Grievant was involved in an incident that led the District to suspend and ultimately discharge him on the grounds of intemperance, cruelty, willful neglect of duty, and persistent and willful violations or failure to comply with school laws, including official directives and established policy of the District. The District alleged that the Grievant engaged in excessively aggressive behavior by striking a student with his fist during his third period Ag Mechanics class. The District also alleged that, in addition to striking the student, referred to herein as "Hunter," the Grievant took Hunter to the greenhouse section of the classroom and threatened him, telling him that if he told anyone about the incident it could result in action against him, including in-school suspension, out-of-school suspension, or even expulsion.

The incident involved students working on a class project wherein they were creating cutting boards to be presented as gifts to their parents. The project required the use of a power wood planer to plane the wood, and the Grievant was assisting many of the students in running the wood through the planer. As the Grievant was planing the wood of one of the students, Hunter came up behind him and used a long piece of one inch by one inch scrap wood to "goose" the Grievant in the buttocks. The District alleged that, after Hunter made contact with the Grievant, the Grievant turned around and struck Hunter in the back with the swing of a right-handed closed fist as Hunter was turned around replacing the wood on the scrap wood pile. The

Association maintained that the Grievant did not intentionally strike Hunter, but rather reflexively "whirled around" and brushed his hand against Hunter as he did so.

After the Grievant made contact with Hunter, he then scolded him and later requested that Hunter stay after class so they could have a discussion in the greenhouse area of the shop. Several students at hearing testified to having seen a distinct red mark on Hunter's back where contact was made. Multiple students also testified to hearing a "thump" when the Grievant made contact with Hunter, despite the noise emanating from the wood planer. The District alleged that, during the greenhouse discussion, the Grievant warned Hunter that he could receive in-school suspension, out-of-school suspension, or even expulsion if anyone found out about the incident. Several students in the class later asked Hunter about the incident, but Hunter insisted that no one discuss it or pursue the topic any further.

For approximately two months no one in District administration was aware of the incident. However, on February 11, 2015 the District became aware of the incident after another teacher became aware of the incident and informed the Association President, who then informed District administration. The High School Principal, Rodney Benedick, then commenced an investigation that same day. The investigation began with an interview of Hunter and, upon confirmation from Hunter that the alleged incident did occur, the Superintendent and District solicitor were notified. Additional students were also interviewed on February 11 to continue gathering information. The student interviews were conducted by the District one at a time, and not as a group. The District also notified both Child and Youth as well as the Pennsylvania State Police. Neither the District nor the Association are aware of any action having been taken by Child and Youth. The State Police filed charges against the Grievant and a hearing was held

before a Magistrate, who dismissed the charges for lack of evidence due to the absence at the hearing of testimony from any witness other than Hunter.

On February 12, 2015 the Principal and Superintendent, along with the Association President, met with the Grievant in his classroom to discuss the incident. At that time the Grievant was placed on suspension with pay pending further investigation. Following the investigation, a meeting was held on March 3, 2015 between District representatives, the Grievant, Association representatives, and an attorney for the Grievant. At this meeting, the Grievant was afforded the opportunity to reenact the events of December 17, 2014. The Grievant claimed to have moved in a reactionary way as he spun around and brushed/grazed Hunter across the chest with his left hand. Grievant at that time also recalled no discussion with Hunter in the greenhouse. A recess was taken, during which the District decided to move to a Loudermill hearing, following which the Grievant was notified that he was being placed on suspension without pay pending discharge.

On March 9, 2015 the following grievance was filed protesting Grievant's suspension without pay:

> **"<u>Statement of Grievance</u>: The District violated the collective bargaining agreement when it suspended Sean Scanlon, a bargaining unit member, without pay, pending termination without just cause.**
>
> **<u>Relief Sought</u>: The Grievant be made whole in all legal and contractual aspects including but not limited to: 1) reinstatement to teaching position; 2) payment for all lost money; 3) expunge all district files of everything on this incident; 3) [sic] 6% per annum interest on all monies due; 4) [sic] any other relief deemed appropriate by the arbitrator.**

The Association requested that the school board allow the grievance to skip Step III and proceed directly to arbitration. This request was granted. A Statement of Charges letter was issued by the District to the Grievant on March 11, 2015 citing reasons for the dismissal as intemperance, cruelty, willful neglect of duties, and persistent and willful violations of or failure to comply with the School Laws of the Commonwealth, including official directives and established policy of the School District. That letter provided, in pertinent, part as follows:

> **"On Wednesday, December 17, 2014, at 3rd period in Ag Mechanics Class, you were working at a wood planer, assisting students who were planning pieces of wood for a project. A 16-year-old male Student (HR) standing behind you touched you in the buttocks area with a piece of scrap wood. It was reported that the Student turned away and you spun away from the planer. According to reports from a majority of the students present, the Student now had his back turned to you and it was reported that you struck the student with a forceful blow to the back. The students reported and demonstrated it as a side-arm punch which landed in the middle of the Student's back.**
>
> **Several of the students, including the Student who was struck (HR), stated that you spun the student around by the shoulders/arms so that the Student was facing you. The Student who was struck admitted that you scolded him for touching you while you were working. He reported that you informed him he needed to stay after class.**
>
> **Within the class period, several students went over to Student HR. It was reported that one of the students pulled up HR's shirt and several students reported seeing a large red mark on his back. Some students went into more detail indicating that they could actually see indentations of portions of your arm and/or fingers.**
>
> **It was reported that Student HR stayed after class. You and the Student went to the greenhouse where you held a discussion. According to reports from the Student, you indicated to him you would insure the Student would be kicked out of school or receive some other harsh punishment if he told the Office/Administration or other students about the incident.**
>
> **It needs to be noted that this incident was not reported to the Office/Administration until Wednesday, February 11, 2015. As soon as this was reported to the Building Principal, a report was made to Child Line as**

well as Franklin County Children and Youth as well as the Pennsylvania State Police.

It needs to be noted that at no time did you report or otherwise inform the Building Principal of the incident in the shop class. The matter eventually found its way to the Building Principal some two months after it had come to the attention of teachers who ultimately reported it to the Building Principal.

A meeting was held with you, your local Association representatives (Matt Piper and James Novak), your UniServ Representative Marcia Bender and Bob Daniels. The purpose of the meeting was to afford you an opportunity to address the events that transpired on Wednesday, December 17, 2014 in your 3rd period Ag Mechanics Class. At the time of the meeting, you had indicated that the student had poked you in your back side. You stated that you spun around and only had minor incidental contact with the Student. When you demonstrated the incident, you held your hands closer to your chest and indicated that you may have slightly brushed the Student but in no way did you interact with him in such a way to have any direct forceful contact with the Student. If was shared with you by the Superintendent of Schools that out of the number of students in the classroom, there were close to 8 or 10 reports by not only the Student who had been struck but others in the classroom that the events that transpired in that class on Wednesday, December 17, 2014 during 3rd period were completely different from what you described."

The Association's grievance was later amended to include the discharge. On April 13, 2015 the school board approved a motion to discharge the Grievant by unanimous vote.

ISSUE

Whether the District had just cause to discharge the Grievant? If not, what should be the appropriate remedy?

POSITION OF THE SCHOOL DISTRICT

There is no doubt in this case that credibility of witnesses will come into play.

Credibility is always important in fact-based cases. The term itself sounds imposing but in all reality credibility is simply believability. For the most part, believability comes down to one simple thing. Does it make common sense to you? Does it make sense what you just heard? If it makes sense, it may be believable. If it does not make sense or it gives you that feeling you get when your kids come home and you ask "who did that" and they said "I didn't to it" then you say "I'm not sure I believe that." So, if you get that feeling inside that tells you what you just heard might not be right, then maybe it is not believable.

The District called 14 witnesses as part of its case in chief; 12 students along with the High School Principal and the Superintendent.

Furthermore, it needs to be noted that the Association did not call any other witnesses as part of their case in chief. Marcia Bender, Matt Piper, and John Novak attended all three (3) days of the hearing. They were also all present at the March 3, 2015 investigatory interview/Loudermill meeting. None of them were called to testify. That means the testimony of Mr. Benedick and Dr. Prijatelj was unrebutted that on March 3, 2015 Mr. Scanlon denied he took Hunter R. to the Greenhouse and threatened him and likewise Grievant had stated and then demonstrated that after he got poked he spun to his left and he made incidental contact with his left hand to the chest of Hunter R.

We believe when the dust settles it is clear our witnesses were more credible. A lot of student testimony was summarized within the brief; however, attached hereto as an exhibit is an overview showing how the students testified in the broad categories of striking, other, red mark, greenhouse, poke/nudge, date of occurrence, student reaction, perception and attempting to get Grievant in trouble.

Of the 12 student witnesses, 6 saw the red mark. The testimony stands on its own. Red marks, finger prints, welts, etc.

On March 3, 2015 at the investigatory interview, Mr. Scanlon told the Administration that he never took Hunter R. to the greenhouse. Six (6) students saw Mr. Scanlon take Hunter R. to the greenhouse. On March 3, 2015, Mr. Scanlon was adamant it never occurred. On December 9, 2015 he equivocated stating he doesn't recall stating that.

Nine (9) of the students testified they saw the hit in the back. Only (1) thought he saw a punch in the chest.

As to the issue of where Mr. Scanlon was touched, etc., seven (7) students said he was poked in the rear. One (1) said goosed, and one (1) other said goosed but he was on the other side of the table and couldn't see where Mr. Scanlon got hit.

As to the red herring argument that the students were conspiring or otherwise trying to get Mr. Scanlon in trouble, that that testimony stands on its own. Ten (10) said they were not trying to get Mr. Scanlon in trouble. They were telling the truth. They were telling what they observed. They never talked about the incident themselves. They were never told what to put in their statements, etc., etc.

Dr. Prijatelj and Mr. Benedick both confirmed that on March 3, 2015 the Grievant testified that he swung around to his left, catching his left hand between the waist and chest of Hunter R. He claims it was instantaneous. It was with his left hand. It was an inadvertent contact.

The students' testimony stands on the record but half confirm that there was a time delay between Grievant getting touched and reacting to the situation. Some of the students went into very exacting detail of Hunter R. taking 3 to 4 steps. Mr. Scanlon completing the planning of

wood, instructing students to take over, etc. The District believes when it is all said and done, the testimony of the students is far more credible as to what transpired.

A lot of red herrings were thrown out but at the end of the day, it was the Grievant who chose to ignore all common sense and established protocols and procedures that are in place in regard to these types of issues.

Without belaboring what has been said before, he didn't report it in any fashion or raise it from December 17, 2014 on. The argument of the District is that he intentionally concealed it because he knew his job was in jeopardy. He was a mandated reporter. He has been a substitute for 9 years in other school districts. Surely along that period of time he has referred students for disciplinary action, reviewed teacher handbooks, student handbooks and become familiar with policy. To say he doesn't know, based on the above, simply is not believable.

All the red herrings and conspiracy arguments have already been addressed elsewhere within the Brief. The District believes it has done an incredible job anticipating and addressing each one and showing how they really have no merit in this particular case to mitigate against the serious conduct and actions of the Grievant.

They will certainly try to vilify the student and try to embrace this and turn it into some type of a sexual assault and appeal to the Arbitrator that students should not touch teachers. That is true. But the reality is even if the student would have been disciplined with an in-school or out-of-school suspension, the Grievant, not the student, took this all away. Lest we not forget that it was the Grievant who took the student to the proverbial "woodshed" (greenhouse) and threatened him that caused the student to tell everybody else *please do not repeat this.*

It needs to be emphasized again when this eventually did come out, and we don't know how, other than the fact that we know it came from a teacher who took it to the Association

President who knew enough that this was so serious to take it immediately to the Principal. Are we really going to believe that the Grievant didn't know how serious this was?

We now have the issue of Mr. Scanlon at least without smiling, trying to say he didn't know that there was a student handbook, a teacher handbook, a school district policy, addressing this issue. This is where credibility and believability really come into play. It is all too easy to just simply state *I didn't know and because I didn't know you can't hold me accountable.* It is the old ignorance is bliss and *because you can't prove that I looked at this, I really cannot be held accountable.*

The reality is yes, he can be held accountable. Not only is it common sense that you do not hit students, it is common sense that there doesn't need to be a rule for everything. But, in this case there was and he had the ability to look at it. For him to simply say he was busy or didn't have time or simply did not look at it is not going to cut it in this case.

The District is arguing and putting forth that the Grievant knew, or should have known, about such policies and procedures based on the totality of the testimony and the fact that he has been a substitute for 9 other years in several other schools.

The Courts and Secretary of Education have received numerous cases over the years where employees just try to argue that there is either no policy or they did not know it existed. The District would submit for the Arbitrator's consideration the case of Foderaro vs. Sch. Dist. of Phila., 531 A.2d 570 (1987). That case involved the termination of a professional employee. While it had to do with violations of school purchasing protocols and policy, in that case, Mr. Foderaro argued there was no substantial evidence to support the Board's conclusion that he violated School Law and that there was no school policy which specifically prohibits or even addresses the making of personal purchases through the school for one's personal use with

personal funds. For starters, in that case the Board properly found that personal purchases are not permitted. Just as in this case, it goes without saying that you do not strike kids but we know there has been no corporal punishment in the Commonwealth of Pennsylvania since 2005. (22 Pa. Code 12.5). There are also policies and procedures to that extent.

In Foderaro the next argument put forth by the Petitioner was that the Board concluded that he, Foderaro, "knew or should have known that his personal purchases made in the school's name were improper and thus he willfully violated the school policy by making those purchases. In ultimately rejecting Mr. Foderaro's arguments, the Court actually stated:

> **"We reject this argument. We believe Petitioner has really presented us with a question of credibility . . . ."**

In conclusion, this boils down to believability. Does the Arbitrator really believe after 9 years as a substitute employee, having gone through school, gone through mandated reporter training, being certificated, going through clearances, knowing what you have to do, being around policies and procedures for the past 9 to 10 years, is it really believable that Mr. Scanlon wouldn't know that he cannot hit kids.

The simple answer is "No."

The inquiry still is not over. Not trying to draw upon the old classics, the District believes it is apropos in this case. Everyone may remember the television show "I Love Lucy." As Desi Arnaz would say, *You have got a lot of explaining to do.*

The same is equally true in this case. The Grievant tried to say with a straight face that he did not know what policies and procedures existed. However, this is completely belied by the fact that on December 16, 2014, Mr. Scanlon did a disciplinary referral on a student and on December 17, 2014, he did two (2) disciplinary referrals. In fact, the referrals on December 17,

2014 emanate out of the **same 3rd period class** involving the incident with Hunter R. To somehow say he did not know policies and procedures were in place when he testified that he spoke with the Assistant Principal and then he actually made these three (3) referrals coupled with the fact that he has worked for almost 9 to 10 years in other schools, simply is not credible or believable that he did not know that he should not hit kids or subsequently not report it.

It is pretty clear that Mr. Scanlon knew he was in trouble. He called Hunter R into the greenhouse and threatened him. The student abided by Hunter R's wishes not to talk about it. There really is not much that can be said.

As far as just cause, the District has clearly addressed all of the elements of just cause. As to the last element of considering the employee's time and tenure in the District, Mr. Scanlon was only in the District for 4 months when this occurred. He has been floating around from school district to school district for 9 years. He knows what the policies and procedures are; he simply did not follow them and he tried to conceal a significant violation of policy and procedure, not to mention state regulation prohibiting corporal punishment.

We will hear the spin about this was self-defense. This was <u>not</u> self-defense. There is nothing in the record that would otherwise suggest that based on the testimony that has been presented that it was self-defense. Yes, he was acquitted by a District Magistrate but we already know it was due to an inexperienced State Trooper not having corroborating witnesses.

The Association is now trying to cry foul, look at how serious it was, the student touched a teacher, look how inappropriate, what if it was a woman, etc. It wasn't a woman. Most, if not all, of the students said it was a slight "poke" in the rear. Even if you accept that it was, we have seven (7) students stating that there was a significant time delay. While Paige P.

did not see the strike immediately after it occurred, she said Mr. Scanlon was "red faced and screaming." Other students said it was clearly intended to punish.

The District has presented a comprehensive case. There is nothing in the record that would otherwise suggest that the decision of the Board of School Directors to terminate Mr. Scanlon should be disturbed. Students are concerned and both Administrators are concerned that Mr. Scanlon should not come back as an instructor at Tuscarora School District. He has compromised his ability to make sound judgment. It is clear he is not to be trusted simply by the fact that he chose to intentionally hide his conduct and actions and threatened a student with possible further action in the event it would become uncovered. This is not what professional educators do.

Mr. Scanlon's actions, in addition to running afoul of the Chapter 12 Regulations and the School Code, also violate the Educators Code of Conduct and School District Policy.

The District believes at the end of the day, the decision of the Superintendent and Board of School Directors to terminate Mr. Scanlon's employment should be upheld.

POSITION OF THE ASSOCIATION

Under the collective bargaining agreement, a professional employee may only be dismissed for just cause. While the parties' collective bargaining agreement requires that the District have just cause for discipline, the collective bargaining agreement does not include a definition of "just cause". Where, as here, the parties have not defined "just cause" and have not limited the arbitrator's interpretation of the phrase, it is within the sole province of the arbitrator to interpret the phrase and determine whether just cause exists under the circumstances.

Despite varying interpretations, there is a general consensus as to some of the factors that should be considered in determining whether just cause exists and in evaluating the penalty that has been imposed. The Pennsylvania Commonwealth Court has identified seven factors that must be considered in determining the existence of "just cause" for discipline:

1. whether the employee was forewarned by the employer of the possible disciplinary consequences of his conduct;

2. whether the employer rule or order was reasonably related to the orderly, efficient and safe operation of the business and reasonable expectations regarding employee performance.

3. whether the employer attempted to determine if a rule or order was in fact violated prior to disciplining the employee;

4. whether the investigation was conducted fairly and objectively;

5. whether there was substantial evidence or proof of the employee's violation;

6. whether rules and penalties are applied even-handedly to all employees.

7. whether the discipline was proportional to the proven offense and the employee's work record.

The District's investigation was neither fair nor objective, and it therefore failed to meet the standard required by just cause. The District's investigation did not reveal a unified narrative like the one presented at arbitration. Rather, the student accounts varied greatly and failed to paint a picture of intentional wrongdoing on Mr. Scanlon's part. Also, the District's delay in conducting the investigation, as well as its inexplicable decision to bring the students to the office in groups to be interviewed, skewed the results of the investigation. Finally, evidence

produced during discovery suggests that the District's goal throughout the investigation was to dismiss Mr. Scanlon regardless of what the investigation uncovered.

The District's investigation was also flawed because of the delay in interviewing students and the manner in which students were interviewed. Apparently, no student had deemed the incident worthy of reporting until February 11, 2015. When the students were summoned to District administration to be interviewed, they were brought in a group. At arbitration, Principal Benedick could not recall if he talked to the students as a group before he interviewed them as individuals. The delay in the interviews and the collective nature of the interview process provided the students, who were already a close group of friends, with the opportunity to unite their stories in an attempt to discredit a new teacher. As demonstrated at arbitration, Mr. Scanlon was not in favor with several senior students who could not accept that he was difference from their former teacher. The District's failure to take basic investigatory precautions led directly to this biased result.

The District's surprising decision to dismiss Mr. Scanlon from his employment based on an unclear incident and a biased investigation becomes less surprising when viewed through the lens of a powerful piece of evidence obtained through the discovery process. In a note written by Mr. Benedick on January 15, 2015 he indicates that the parents of FFA leaders had asked "how we can get [Mr. Scanlon] fired". This note, made after the December 17 incident but before the District's investigation, made the results of any investigation of self-fulfilling prophecy. Due to complaints by a group of students and parents who did not want Mr. Scanlon to be their teacher, the District decided to terminate him, and set about doing so through an unfair and subjective investigation.

The District also failed to produce substantial evidence that Mr. Scanlon actually engaged in behavior that implicates any rule or order listed in the Statement of Charges. The evidence of the incident offered by the District consisted solely of student testimony. The accounts were varied, leading to an unclear picture of what actually occurred. The accounts were also biased because they were provided by students who had motivation to lie because of their participation in misbehavior and their personal dislike of Mr. Scanlon. Taken together, the evidence suggests that the incident was an instinctual reaction rather than a planned action. Such a reaction does not implicate any rule or order listed in the Statement of Charges.

The student testimony offered an unclear picture of the action Mr. Scanlon actually took. Besides being inconsistent, most of the accounts are unreliable on account of bias. The students who were eyewitnesses had motivation to exaggerate their description of the incident because of their own misbehavior or their personal animosity toward Mr. Scanlon.

Moreover, even if a substantial amount of evidence demonstrates that Mr. Scanlon turned around and struck Hunter after Hunter assaulted him, this instinctual reaction does not constitute a violation of any rule or order listed in the Statement of Charges. As cited by the District in its Statement of Charges, Chapter 12 of the Pennsylvania Code defines "corporal punishment" as physical discipline that is intended to cause pain and fear. 22 Pa. Code §12.16. That definition does not fit the reactive movement of Mr. Scanlon, which was not taken with punishment of any kind in mind. In additional, the Pennsylvania Code clearly allows teachers to use reasonable force to quell disturbances, for the purpose of self-defense, and for the protection of persons and even property. 22 Pa. Code §12.5. All of these criteria fit the reactive movement of Mr. Scanlon. The action taken by Hunter Ricker constituted an assault of Mr. Scanlon's person, which called for a self-defensive movement. It occurred while Mr. Scanlon was operating a

dangerous piece of power equipment near other students, which implicated the safety of everyone standing near the planer. It also unquestionably created a disturbance in the class. If anything, Mr. Scanlon's movement constituted reasonable force under the Pennsylvania Code.

Also, despite the District's insistence that part of the basis for Mr. Scanlon's discipline is his failure to report the physical contact between himself and Hunter Ricker, none of the rules put forward by the District explicitly require such a report If this type of report is expected of its employees, the District had the responsibility to make Mr. Scanlon, a brand new teacher, aware of that requirement.

The Association submits that Mr. Scanlon's conduct did not warrant disciplinary action in any manner under the circumstances presented, as he did not act in violations of any District policies and the District has failed to meet its burden of providing substantial evidence of any such violations. However, to the extent that the Arbitrator determines that discipline was appropriate, dismissal was too harsh a penalty in light of Mr. Scanlon's potential as an educator and his lack of previous discipline.

Furthermore, the seriousness of the discipline in this case calls for the application of a more stringent evidentiary standard than the "substantial evidence" standard described in the just cause test. Quantum of proof is essentially the quantity of proof required to convince a trier of fact to resolve or adopt a specific fact or issue in favor of one of the advocates. Arbitrators apply various standards of proof according to the issue disputed. In a case such as this, where the District has alleged that Mr. Scanlon engaged in the physical abuse of a student and has terminated his employment, a "beyond a reasonable doubt" or "clear and convincing evidence" standard is most appropriate. Under either of these standards of evidence, the District has utterly failed to make its case.

In his short tenure with the District, Mr. Scanlon received satisfactory evaluations and had no prior disciplinary problems. As a teacher with a prior career in a unique and related field, Mr. Scanlon has much to offer the District as an educator and as the sponsor for the FFA. There is no good reason – or at least no reason that is not arbitrary, capricious, or discriminatory – to assess dismissal. Justice and fairness are not served – nor, more importantly, are the interests of Mr. Scanlon, the students, the District and the community – by removing such an educator. Accordingly, the Association respectfully requests that its grievance be sustained and an award be issued reinstating Mr. Scanlon to employment with full back pay and benefits with interest.

Any just cause analysis entails a determination of whether the reasons for dismissal meet the grounds for termination of a professional employee's contract listed in the School Code. Such a contract can be terminated only for the grounds in Section 1122. Here, the District charged Mr. Scanlon on the following grounds: intemperance, cruelty, willful neglect of duties, and persistent and willful violation of or failure to comply with school laws of the Commonwealth of Pennsylvania (including official directives and established policy of the board of directors).

The District failed to establish intemperance. Intemperance has been defined as a loss of self-control that is extreme, violent, or severe. However, Pennsylvania appellate courts generally do not uphold dismissals on the ground of intemperance under the School Code. Here, Mr. Scanlon's reaction was unintentional and much less severe than the conduct condoned by the Supreme Court in Belasco. Consequently, the charge of intemperance is without support and the District has demonstrated no basis to dismiss Mr. Scanlon on that ground.

The District failed to establish cruelty. The notion that the instinctive behavior of Mr. Scanlon under these circumstances could be characterized as "wanton," "malicious" or "abusive"

is wholly without merit. Nothing in the record remotely suggests that Mr. Scanlon repeatedly or even intentionally hit anyone. The incidental contact with Hunter that occurred when Mr. Scanlon spun around after Hunter assaulted him with a plank of wood is a far cry from the intentional infliction of physical suffering necessary to constitute cruelty. Therefore, the District cannot show that Mr. Scanlon acted cruelly in violation of the School Code.

The District failed to prove conduct by Mr. Scanlon willful neglect of duties or persistent and willful violation of or failure to comply with school laws of the Commonwealth (including official directives and established policy of the school board). Although these two phrases constitute separate grounds for dismissal, through judicial interpretation they are essentially coextensive. Courts have defined persistent negligence as a continuing or constant failure or refusal to comply with directions or a violation of the School Code.

The courts have interpreted "persistent" to mean a series of incidents or one incident carried on for a substantial period of time. The District, thus, must show that Mr. Scanlon repeated the same kind of misconduct on numerous occasions. The District cannot make this showing because there is no indication whatsoever that this type of incident occurred before or after the single occurrence on December 17, 2014.

Dismissal for persistent negligence is warranted only when a teacher fails to comply with the directive of supervisors on numerous occasions or when a single act is continued for a lengthy period of time. The District was required to prove that Mr. Scanlon had "knowledge that the conduct in question was wrong and that its repetition could lead to discipline or discharge." The District failed to meet this requirement.

The District in this case has also alleged that Mr. Scanlon's conduct constitutes willful neglect of duties under Section 1122 of the School Code. The fact that a single incident may be

sufficient suggests that, in order for this to be the case, the incident must be of a very serious nature. No such evidence is present in this case.

Willfulness requires the presence of intention and at least some power of choice. "For a violation of school law to be willful, the district must show that the employee knew of the school district's policy in question and deliberately chose not to comply. As shown above, however, there was no intent on Mr. Scanlon's part. His action was a reactive, involuntary response to a real threat to himself and others in the classroom.

The District has offered no competent evidence to support its decision to dismiss Mr. Scanlon from his employment. The Arbitrator, who retains full authority to resolve this grievance, enjoys the authority to modify Mr. Scanlon's discipline and to make him whole. The Association submits that the proper make-whole remedy in this case is reinstatement without loss of income, benefits, retirement or seniority to the date of suspension pending dismissal, with full back pay and reimbursements for any expenses that would not otherwise have been incurred but for the dismissal, including statutory interest as required by the Public School Code, and such other action as the Arbitrator deems just and fair.

In summary, the Association respectfully submits that, because there is no component evidence of just cause for Mr. Scanlon's suspension or dismissal, the Arbitrator should award the make-whole remedy described above. In the alternative, should the Arbitrator find that there was no just cause for discharge but sufficient evidence to show just cause for some lesser penalty, the Arbitrator should exercise his authority to modify the unreasonable discipline imposed on Mr. Scanlon by the District.

FINDINGS AND DISCUSSION

Discharge is recognized to be the extreme industrial penalty since the employee's job, seniority, other contractual benefits and reputation are at stake. Because of the seriousness of this penalty, the burden is on the Employer to prove guilt of wrongdoing. Quantum of proof is essentially the quantity of proof required to convince a trier of fact to resolve or adopt a specific fact or issue in favor of one of the advocates. Arbitrators have, over the years, developed tendencies to apply varying standards of proof according to the particular issue disputed. In the words of Arbitrator Benjamin Aaron, on some occasion in the faraway past, an arbitrator referred to the discharge of an employee as "economic capital punishment". Unfortunately, that phrase stuck and is now one of the most time honored entries in the "Arbitrator's Handy Compendium of Cliches". However, the criminal law analogy is of dubious applicability, and those who are prone to indiscriminately apply it in the arbitration of discharge cases overlook the fact that the employer and employee do not stand in the relationship of prosecutor and defendant. The basic dispute is still between the two principals to the collective bargaining agreement.

In general, arbitrators probably have used the "preponderance of the evidence" rule or some similar standard in deciding fact issues before them, including issues presented by ordinary discipline and discharge cases. However, where the alleged cause for disciplinary action or discharge is misconduct of a kind recognized and punished by the criminal law, or is of a kind which carries the stigma of general societal disapproval, as well as disapproval under accepted cannons of plant discipline, the Employer must meet a higher standard of proof. Arbitrator Russell A. Smith is much quoted for enunciating what I believe is the more appropriate standard under such circumstances, i.e. “clear and convincing evidence”. It therefore seems reasonable

and proper that misconduct of the kind alleged within should be **"clearly and convincingly"** established by the evidence.

The Grievant was discharged for allegedly intentionally striking a student – Hunter – who had "goosed" him in the buttocks during the 3rd period Ag Mechanics class on December 17, 2014. Although there is some dispute regarding the amount of force with which Hunter "goosed" the Grievant, there is no dispute that he did commit that grossly inappropriate act.

I must state at the onset how audacious and reprehensible I find Hunter's conduct to be in coming up behind his teacher and "goosing" him in the buttocks with a stick measuring 1"x1"x17.5". At that moment the Grievant was running a piece of wood through a planer which is a dangerous activity and should not be interrupted. Former student Paige Plessinger testified that she observed how the Grievant's face was "beet red" after he was "goosed" by Hunter (T. 153) evidencing the obvious humiliation he must have felt by being subjected to such an insulting act by one of his students in front of the entire class. I must also express how disappointed I am with the District's decision not to administer any penalty whatsoever for such gross misconduct by a student against a teacher.

After "goosing" the Grievant Hunter turned around and placed the stick back on the pile of scrap wood behind him. The Grievant finished pushing the piece of wood he was working on through the planer. He then turned and swung at Hunter hitting him with a right-handed closed fist to his back with enough force that the blow was heard by some of the students in the class. All but one of the students who testified indicated that there was a perceptible delay between the time the Grievant was "goosed" and when he struck Hunter. The Grievant conversely testified that he did not deliberately strike Hunter. Rather, he maintains that he reacted reflexively and whirled around, inadvertently making contact with Hunter as he did so.

The Grievant was subsequently discharged on the grounds of intemperance, cruelty, willful neglect of duties, and persistent and willful violations of or failure to comply with the school laws of the Commonwealth, including official directives and established policy of the school district. All of those charges directly pertain to the District's allegation that the Grievant intentionally struck Hunter.

Unfortunately, this Arbitrator may never know with unerring certainty precisely what occurred on December 17, 2014. While desirable, it is not possible to have the opportunity to actually observe for myself the events as they unfolded during the time period in question. Moreover, this case presented witnesses whose testimony was diametrically opposed with respect to fundamental facts. While this certainly increases the difficulty of the task with which this Arbitrator is confronted, it is not uncommon in arbitration cases involving disciplinary action for two conflicting versions to arise.

Arbitrators use various tools or principles in assessing witness credibility. For example, a principle adopted by some arbitrators is that the incentive of any grievant in a discharge arbitration case to lie or attempt to minimize their misconduct is obvious. A grievant's job tenure is at stake whereas no similar motivation confronts the employer's witnesses. This principle also recognizes that the continued job tenure of a grievant is sufficient motivation, in and of itself, to lie or to construct a self-serving "spin". It is important to note, however, that having an interest or stake in the outcome does not disqualify the witness. Rather, it merely renders their testimony subject to very careful scrutiny.

However, for this Arbitrator to find in favor of the Grievant I would have to discount the testimony of all of the District's witnesses who participated in the events leading up to Grievant's discharge. Furthermore, the Arbitrator would have to conclude that each and every

witness called by the District lacked credibility with respect to each and every critical factor. Such a conclusion would be a daunting task for the Association to achieve even under the best of circumstances. When the testimony and motives of the respective witnesses are fully considered the only appropriate conclusion I can reach is that those individuals called by the District to testify must be credited over those presented by the Association.

After carefully considering the record evidence there is no doubt that the Grievant did, in fact, strike Hunter. However, the determinative issue is the nature of that contact, i.e. was it accidental and/or reflexive; was it intentional and, if so, was it with enough force to warrant the discharge of the Grievant on the grounds as charged; or was it justifiable in any manner?

The testimony of the numerous student witnesses was relatively consistent in describing the manner in which the Grievant struck Hunter. First, they indicated that there was an observable delay between the "goosing" and the strike. Such a delay strongly suggests that the Grievant deliberated before striking Hunter and that he did not act reflexively. As can be expected with all eyewitness testimony there were some inconsistencies in the students' accounts as to the length of the delay. However, I find those inconsistencies to be within reasonable variances given how the strike occurred, where the witnesses were located in the shop, etc. Next, several of the students testified that Hunter later lifted up his shirt and they clearly observed knuckle/hand marks on his back as a result of the blow. Finally, several students testified that they actually heard a thump as the Grievant's fist struck Hunter's back.

I am quite mindful of the Association's argument that the students' testimony must be viewed in light of the circumstances surrounding Grievant's employment. The Grievant was a new teacher, just over three months into his tenure, who had replaced a very popular long time shop teacher who retired the summer prior to the start of the school year. The Grievant also

replaced that former shop teacher as the faculty advisor to the FFA (Future Farmers of America). The record indicates that the former shop teacher was also extremely popular as the FFA advisor. But the Grievant, in the students' opinion, fell far short of the former advisor's performance as FFA advisor. In fact, the record shows that some of the students had a desire that the Grievant be discharged, as indicated by the following testimony from one of the District's student witnesses:

> **"Q. Were you aware, Carson, that some of the FFA leaders were trying to get Mr. Scanlon fired?**
>
> **A. Yes." (T.267)**

Moreover, a document prepared by the High School Principal when he was meeting with a former student (Mandy Clark) who is the older sister of a current student is also telling. Mandy came to discuss some "issues" that the students in Grievant's class were having and proceeded to tell the Principal that "parents want to know how can we get [the grievant] fired?"

Also significant is the testimony of the former FFA president, Paige Plessinger, who is now a college freshman. She testified that the FFA leadership maintained a "happening document," which was a running list of all of the Grievant's perceived transgressions as the advisor to the FFA, which they anticipated they may need to eventually take to the administration in response to some dire unknown future event. Although Plessinger testified that it was not the intent of the FFA leadership to see the Grievant discharged, such desired outcome can reasonably be inferred in light of the testimony reproduced above as well as the following testimony from her:

> **"Q: Were you ever threatened [by the grievant]?**
>
> **A. Like all the time he would always tell me like ---. Well, he would like take me into the shop and be, like, you're**

a horrible president. You're a bad example for these kids. You need to be more supportive of me . . . ." (T. 169)

As a whole, the record indicates that the Grievant was a teacher who was competent yet unpopular because of his inability to devote as much time to advising and working with the FFA as the former FFA advisor had done. Because many of the students, and in particular the leadership of the FFA, would not be unhappy if the Grievant was to be discharged, the Association rightfully questions the veracity and reliability of much of the student testimony.

The Association also suggests that the student witnesses had the "opportunity" to compare notes prior to providing their statements to the Administration. Although the students were interviewed individually by the Principal, they were to some extent assembled in groups. Moreover, the interviews did not take place until nearly two months after this incident which can obviously diminish memories. Furthermore, the students undoubtedly discussed the incident amongst themselves, as indicated by the following student testimony:

"Q. Would it be accurate to state that you heard other students in your class talking about it, and you talked with other students in your class about it?

A. Yes. Inside the class we did."

However, the fact that many of the students, who were already a close group of friends, admittedly were **"talking"** about the incident does not imply that they were conspiring to or did correlate their stories in an attempt to discredit and get rid of a new teacher who they admittedly did not like or respect. High School students "talk" constantly about anything and everything. However, in the final analysis I do not believe the manner in which the students' testimony was gathered is fatally flawed nor disqualifies any of these witnesses. It simply renders their testimony subject to careful scrutiny.

Turning now to the specific charges against the Grievant. Section 1122 of the Pennsylvania School Code identifies Intemperance as a valid cause for termination of a professional employee, as Grievant was charged. Although the School Code does not provide a definition of Intemperance, Pennsylvania Courts have defined Intemperance as, "a loss of self-control or self-restraint, which may result in excessive conduct." Case law has further defined "excessive conduct" as conduct "exceedingly the usual, proper, or normal." Finally, loss of self-control has been found to be an essential element of Intemperance.

After a careful and detailed review of the evidence of record, I find the following to have occurred on December 17, 2014: After Hunter "goosed" the Grievant the Grievant finished with the piece of wood he was pushing through the planer and then shortly thereafter swung his closed right fist in a roundhouse motion ultimately landing a blow on Hunter's back. The Association attempts to depict this incident as one in which the Grievant was planing wood, got poked, and reflexively spun around where incidental brushing or grazing of the torso occurred. Unfortunately, there is no credible evidence whatsoever to support such a finding, especially when numerous eye-witnesses indicated the strike as having a time delay between the poke and the Grievant striking Hunter. Simply put, the Association's theory of what happened is improbable and not believable.

Following this blow, the Grievant grabbed Hunter by the shoulder to stand him up, yelled at him to knock off the horseplay in the shop, and sent him into the classroom area. Grievant later notified Hunter that he would like him to stay after class to talk in the Greenhouse. During this conversation, the Grievant then made what was considered a threat by both Hunter and the Administration regarding what could happen to him if he reported the incident. Hunter was told that if this incident got back to the Administration that he could receive in school suspension, out

of school suspension, or even expulsion. A reasonable inference from this conversation is that the Grievant knew the way he handled the situation was improper and he was attempting to keep it hidden. Hunter kept his part of the "bargain" for at least two months before word leaked out from other sources.

Based upon all of the above the District clearly and convincingly established that the Grievant demonstrated a loss of control in responding to student misbehavior on December 17, 2014 because his actions involved unwarranted physical contact, and an excessive amount of aggression directed to a student in a classroom setting. The Grievant's actions also clearly demonstrated an excessive use of force when Grievant struck Hunter so hard with his fist that an imprint of his fist was made on Hunter's back. It is not surprising that the students who witnessed this conduct stated that they were shocked to see a teacher hit a student in this manner.

Finally, School District Policy prohibits any professional educator from ever using any kind of force or physical contact, whatsoever, in correcting student misbehavior, unless the force is being utilized to quell a disturbance, to obtain possession of weapons or other dangerous objects, or for the purpose of **self-defense**, and/or the protection of persons or property. The credible evidence presented would not, by any stretch of the investigation, support an argument that the Grievant was acting in "self-defense" when he swung at and struck Hunter in the back. The District has therefore proven by "clear and convincing" evidence Intemperance on the part of the Grievant in intentionally and with deliberation striking a student. Just cause exists for the Grievant's termination on this basis alone.

However, I feel compelled to add that the detailed factual analysis and arguments set forth above, if applied to the other charges of cruelty, willful neglect of duties and persistent and willful violations of or failure to comply with the school laws of the Commonwealth including

official directives and established policy of the School District, would similarly lead to the conclusion that those charges have also been proven and would individually support the Grievant's termination.

Briefly, Cruelty has been defined as the intentional and malicious infliction of physical suffering on human beings, the wanton, malicious, and unnecessary infliction of pain on the human body or mind. As indicated above, there is substantial record evidence that the Grievant did, in fact, strike Hunter with such force that it left a considerable and distinguishable red mark on his back. Moreover, because there was a perceptible delay in time from when Hunter poked the Grievant to the moment the Grievant swung and hit him, coupled with the force of the swing and the scolding administered immediately thereafter supports the inference that the strike was intentional and with malice. Finally, Grievant's discussion with Hunter in the greenhouse afterward for the purpose of intimidating Hunter not to discuss the matter with the Administration is a clear misuse of the Grievant's authority as a teacher. As such, the charge of Cruelty against the Grievant has been substantiated and termination would also be warranted on this basis alone.

While the final two charges (willful neglect of duties and persistent and willful violation of school laws) are, in fact, additional independent grounds for termination as proscribed by the School Code, under these circumstances they are, for all intents and purposes, subsumed within the more significant charges of Intemperance and Cruelty. That is not to say that Grievant's actions as detailed above did not constitute misconduct under both these charges. Succinctly, with respect to willful neglect of duties Grievant's actions violated District Policy 218 (Corporal Punishment) and District Policy 440 (Responsibility of Staff or Student Welfare). The Grievant's intentional striking of Hunter clearly evidences a willful neglect of those policies.

Likewise, the Grievant's intentional actions taken against Hunter are a clear violation of his duties as a teacher including the duties and obligations for the welfare of his students. Moreover, the Grievant's failure to report the incident with Hunter was also a violation of District policy and directives.

Finally, as a general rule, arbitrators should not interfere with the penalty imposed by an Employer if the collective bargaining agreement permits management to exercise discretion and the reasonableness of the penalty is not seriously called into question. However, even when their power to mitigate a penalty is unencumbered arbitrators should be loathe to substitute their judgment for that of management unless the degree of mitigation is a major and consequential change. There is no contractual prohibition against this Arbitrator reviewing the penalty imposed by the School District. However, after careful consideration of all of the evidence presented I am unable to find the existence of any factors that cast doubt upon the appropriateness of the imposition of the penalty of discharge for the within offenses.

Based upon all of the above, the grievance must therefore be denied.

AWARD

The grievance is denied.

Date: May 11, 2016
Pittsburgh, PA

Ronald F. Talarico, Esq.
Arbitrator