

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	Case No.: ARB-12-2274
	*	
MILLBURY SCHOOL COMMITTEE	*	Date Issued: May 23, 2014
	*	
and	*	
	*	
MILLBURY TEACHERS' ASSOCIATION	*	
	*	

The Department of Labor Relations (DLR), having afforded the parties full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at the hearing, has considered the issues, and having studied and weighed the evidence bearing on the issues, awards as follows:

AWARD

The Arbitrator has the authority to hear and decide the grievance over Stephen Roche's suspension. The Employer did not have just cause to issue the August 17, 2012 four (4) day suspension to the grievant, Stephen Roche. The Employer is hereby ordered to reduce Stephen Roche's four day suspension to a written warning.


KATHLEEN GOODBERLET, ESQ.
ARBITRATOR

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of * Case No.: ARB-12-2274
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MILLBURY SCHOOL COMMITTEE * Date Issued: May 23, 2014
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MILLBURY TEACHERS ASSOCIATION *
*

Arbitrator:

Kathleen Goodberlet, Esq.

Appearances:

- Kimberly Rozak, Esq. - Representing the Millbury School Committee
- Laurie Houle, Esq. - Representing the Millbury Teachers Association

ARBITRATOR'S DECISION

SUMMARY

The issues in this case are whether the arbitrator has the authority to hear and decide the grievance, whether the Millbury School Committee (Employer) had just cause on August 17, 2012 to suspend grievant Stephen Roche (Roche) for four days, and if not, what the remedy should be. As a threshold issue, I have the authority to hear and decide Roche's grievance. I also find that the Employer did not have just cause to suspend him for four days. After weighing Roche's seniority, past disciplinary record, and the nature of the offense, I conclude that there is just cause for a written warning. Accordingly, I reduce the four day suspension to a written warning and order the

Employer to remove all references from Roche's personnel file of a four day suspension, inserting in its place a written warning; and to make Roche whole for all losses of wages and benefits associated with the four day suspension.

STATEMENT OF THE CASE

On September 28, 2012, the Millbury Teachers' Association (Association) filed a unilateral petition with the DLR seeking to arbitrate a grievance with the Employer. The Employer filed a Request to Dismiss the Arbitration Petition on October 9, 2012 alleging that Roche was required to seek arbitration pursuant to M.G.L. c.71, s.42. The Association filed its Response to the Request to Dismiss on October 15, 2012. On October 16, 2012, the DLR administratively denied the Employer's Request to Dismiss.

On November 17, 2013, the Association filed a Motion in Limine to exclude a January 6, 2012 letter memorializing a verbal warning to Roche. The Employer filed its Opposition to the Motion in Limine on November 20, 2013. The Arbitrator denied the Association's Motion in Limine at the November 21, 2013 arbitration.

Pursuant to M.G.L. c.23, s.9P, the DLR appointed Kathleen Goodberlet, Esq. to act as a single, neutral arbitrator with the full power of the DLR. The undersigned Arbitrator conducted an arbitration hearing on November 21, 2013, at which both parties had the opportunity to be heard, to examine witnesses, and to introduce evidence. Kimberly Rozak (Rozak) represented the Employer. Superintendent Susan Hitchcock (Hitchcock), Principal Susan Frederick (Frederick), and Principal Mandy Vasil (Vasil) appeared for the Employer. Laurie Houle (Houle) represented the Association. Roche appeared for the Association. Association Consultant Stephen Davis (Davis) and Association President Ann Kach (Kach) also appeared for the Association, but did not

testify. The parties filed post-arbitration briefs on February 3, 2014. Based on the record evidence, including witness demeanor, and in consideration of the parties' post-arbitration briefs, I make the following findings of fact and render the following award.

ISSUES

The parties stipulated that the issues in this case are as follows:

Does the Arbitrator have the authority to hear and decide the grievance over Stephen Roche's suspension?

If so, did the Employer have just cause to issue the August 17, 2012 four (4) day suspension to the grievant, Stephen Roche?

If not, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' collective bargaining agreement for the period August 31, 2010 through August 30, 2013 (Agreement) contains the following relevant provisions:

ARTICLE IV
GRIEVANCE PROCEDURE

The purpose of the procedures set forth hereafter is to produce prompt and equitable solutions to those problems which from time to time arise and affect the conditions of employment of employees covered by this Contract. The Committee and the Association desire that such procedure shall always be as informal and confidential as may be appropriate for the grievance involved at the procedural level involved.

A. A grievance is herein defined as any dispute involving the meaning, interpretation or application of this Contract. A matter which is not specifically covered by any provision of this Contract, or which is reserved to the discretion of the Committee by the terms of the Contract, will not be the subject of a grievance under this Article.

* * *

E. No reprisals of any kind shall be taken by either party to this Contract against any party in interest, any witness, any official of the Association or any other participant in the grievance procedure by reason of such participation.

* * *

G. All grievances must be filed within ten (10) school days of the event on which the grievance is based or from the date on which the employee should have had knowledge of the event.

* * *

4. LEVEL FOUR: In the event that the grievance shall not have been satisfactorily disposed of at Level III, or in the event at (sic) that no decision has been rendered within ten (10) school days following the Level III meeting, the Association or the Committee may refer the unresolved grievance to arbitration in writing within ten (10) school days. Arbitration shall be provided by the Massachusetts Board of Conciliation and Arbitration and a copy of the demand for arbitration shall be furnished to the party not filing.

- a. The selection of arbitrator(s) and the procedures to be followed shall be in accordance with the rules and regulations of the Board of Conciliation and Arbitration then applying.
- b. The arbitrator(s) shall be limited to the interpretation and application of the terms of this Contract and shall not have the authority to alter, modify or amend the Contract.
- c. The arbitrators(s) will furnish a summary of significant issues and facts supporting its decision. The decision of the arbitrator(s) within the scope of his/her (their) jurisdiction shall be final and binding upon the parties thereto unless such decision would impair, infringe upon, or derogate form (sic) the statutory powers and duties of the School Committee.

* * *

ARTICLE VIII BARGAINING UNIT MEMBER EVALUATION

B.2. No material derogatory to a bargaining unit member's conduct, service, character or personality will be placed in his/her personal file unless the bargaining unit member has had an opportunity to review the material. The bargaining unit member will acknowledge that he/she has had the opportunity to review such material by affixing his/her signature to the copy to be filed with the express understanding that such signature in no way indicates agreement with the contents thereof. The bargaining unit member will also have the right to submit a written answer

to such material and his/her answer shall be reviewed by the Superintendent and attached to the file copy.

* * *

D. No bargaining unit member will be disciplined or reprimanded through a reduction in rank or compensation or deprived of any professional advantage without just cause, in which case he/she will be notified by the Superintendent or his/her designee, through a formal written communication, as to why such action is being taken.

* * *

ARTICLE XXII MANAGEMENT RIGHTS

The rights, powers, responsibilities and authority of the Millbury School District shall include but not be limited to the following, except to the extent that such rights are expressly limited by specific provisions of this Agreement or by statute: To . . . demote, suspend, discipline and discharge subject to MGL Chapter 71 and subject to just cause for bargaining unit members with professional status In addition to the provisions of this Agreement, all laws and rules or regulations applicable to a bargaining unit member's rights and responsibilities will continue to be considered to be in full force and effect, nor should anything contained herein be interpreted to permit for the subcontracting of services currently performed by members of the bargaining unit, except where presently practiced (i.e. substitute teachers and long-term substitute teachers). The exercise of the rights contained herein shall not be a matter subject to grievance or arbitration under Article IV of the Agreement.

STIPULATIONS

1. On April 9, 2012, an elementary school student [at the Elmwood Street Elementary School] alleged that [a] teacher hit him while he was waiting in line at the end of lunch period. The student claimed that he was making "raccoon" eyes (used fingers to make circles around his eyes) and the teacher smacked his arms down. The Principal was informed of the allegation.
2. The student [referred to in paragraph 1] initially reported that the incident occurred in the hallway lining up to go to gym class, so the [Employer] reviewed the video from the hallway but saw nothing. The student then stated to a different member of administration that the incident occurred in the cafeteria. The cafeteria video showed the student making "raccoon" eyes and then showed the teacher come

over and push the student's hands down and away from his face. The teacher did not say anything to the student.

3. The teacher [referred to in paragraphs 1 and 2] admitted to pushing the student's hands down.
4. The teacher [referred to in paragraphs 1, 2, and 3] did not want to grieve any discipline and instead agreed to accept a two-day suspension for this incident. He signed an agreement setting forth the terms of the suspension, which also contained a waiver of his rights under M.G.L. c.42D, including any appeal rights. The agreement signed by the teacher also states, "[t]his Agreement shall be without precedent to the rights of the District or the Association in connection with any other matter concerning disciplinary and/or administrative leave issues, and will not constitute a practice or precedent between the parties."
5. [The Employer] did not file a 51A report regarding Roche [in the case at issue, ARB-12-2274].
6. The [Employer] did not raise the issue of the management rights clause precluding jurisdiction in this matter prior to the hearing on November 21, 2013.
7. [In the fall of 2011] Roche signed an acknowledgement of receipt of an employee handbook that states, "I acknowledge receipt of this employee handbook from the Millbury School Committee and I read its contents."

FACTS

Overview

By letter dated August 17, 2012, the Employer suspended Roche for four days, based on its "finding that [Roche] had physical contact with a student, lost control of [his] temper while communicating with a student, and behaved in a manner unbecoming a teacher." The incident at issue occurred on June 5, 2012 during Roche's 8th grade history class at the Millbury Junior/Senior High School. At the time, Roche had about 30 years of teaching experience, having spent the most recent 18 years of his career

teaching in the Millbury Public Schools.¹ The student involved was HC, a “high profile” student with a history of disciplinary issues.² On June 5, 2012, as HC rushed past Roche on her way out of the classroom and yelled in his face, Roche briefly held her wrist and asked her why she had “to act foolish and be the loudest.” HC’s father later complained to Assistant Principal Vasil that Roche had “grabbed” his daughter in class.³ After alerting Superintendent Hitchcock to the incident, Vasil met with Roche, who demonstrated to Vasil that he briefly held HC by the wrist to address her disruptive behavior. Vasil told Roche that she would address the issue by holding a meeting with Roche, HC, and HC’s parents, a plan that Hitchcock approved. However, on June 6, the day after the incident, HC’s father called Hitchcock, alleged that Roche had “assaulted” his daughter, and refused to attend the planned meeting. Consequently, Hitchcock cancelled the meeting, placed Roche on paid administrative leave, and appointed Principal Frederick as Investigator. Hitchcock did not participate in the investigation, but reviewed the Investigator’s notes and discussed the findings and opinion with the Investigator before the Investigator wrote the Investigation Report.

¹ Roche testified at the arbitration in November of 2013 that he had been teaching in Millbury Public Schools for 19 years. Therefore, I conclude that Roche had been teaching in Millbury for about 18 years when the Employer suspended him in August of 2012. Roche previously taught at St. John’s High School in Shrewsbury for 12 years.

² “High profile” is a term Millbury School District employees use to refer to certain students. Roche defined high profile students as those who commit school, classroom, or bus infractions, and are constantly discussed at “CPT” meetings. He did not define CPT meetings. During the Employer’s investigation of the June 5 incident, Principal Frederick, the appointed Investigator, referred to HC as a high profile student during her June 15, 2012 meeting with Roche.

³ The Junior/Senior High School has one Principal, one Junior High School Assistant Principal, and one Senior High School Assistant Principal. In June of 2012, Vasil was the Assistant Senior High School Principal. After the events at issue, she became the Junior/Senior High School Principal.

Before the Investigator issued the Investigation Report, Hitchcock decided that Roche's contact with HC was similar to a recent incident at the Elmwood Elementary School based on Roche's June 5 admission to Vasil that he had touched HC to address her disruptive behavior and the Investigator's interview notes. Hitchcock told Vasil that Roche should receive at least a two day suspension because the Elmwood teacher had received a two day suspension. The Employer had suspended the Elmwood teacher pursuant to a non-precedential disciplinary settlement agreement. When Vasil offered Roche a disciplinary settlement agreement with a two day suspension, he told her twice that he first wanted to see the Investigation Report. On July 20, 2012, three days after the Investigator issued the Investigation Report, Roche rejected the disciplinary settlement agreement. Hitchcock increased Roche's penalty from a two day suspension to a four day suspension to get Roche to accept the disciplinary settlement agreement. By letter dated July 20, 2012, the Employer notified Roche of its intent to suspend him for four days, and on August 17, 2012 the Employer suspended him for four days.

Relevant Policies, Rules, Guidelines and Trainings Regarding Teacher-Student Contact

The Employer has no specific policies, rules, or guidelines that prohibit teachers from touching students and has not told teachers in trainings or other meetings that touching students will result in suspension or other discipline.⁴ However, Hitchcock

⁴ Hitchcock testified that, "in this day and age," school district employees know not to lay hands on a child for any reason, aside from a gentle "attaboy" or a pat on the back for a sad or distressed student. Vasil testified that, "if there's been a continuous situation, or continuous relationship with the student, [touching is] one thing you absolutely never do. You kind of, like, back away from the student." However, there is no evidence of formal, written standards.

addresses appropriate teacher conduct at the first teachers' meeting of the year by emphasizing the importance of professional behavior, student engagement, and respect.⁵ The Employer also distributes the Millbury Public Schools Handbook (Handbook) to teachers. Section I of the Handbook, "General Employment Information," states in relevant part:

It is the expectation of the Millbury Public Schools that all employees demonstrate a professional, cooperative, knowledgeable and courteous demeanor in all interactions with students, families, members of the community and with colleagues. The use of profane language is prohibited and may be cause for disciplinary action.

Section VII (C) of the Handbook contains a "Bullying Prevention Plan," that states:

The Millbury School District has implemented a plan that continues to promote tolerance and respect for diversity and one that encourages positive dialogue to manage differences. The school district expects that all members of the school community will treat each other in a civil manner and with respect for differences.

The school district is also committed to providing all students with a safe learning environment that is free from bullying and cyber-bullying. This commitment has been and will continue to be an integral part of the district's comprehensive effort to promote learning. The school district has not, nor will it tolerate any unlawful, disrespectful, or disruptive behavior, including any form of bullying, cyber-bullying, or retaliation in school buildings, on school grounds or during school-related activities.

Roche's Evaluation and Disciplinary Record

Prior to August of 2012, Roche had consistently positive performance evaluations and one verbal warning. In January of 2012, Roche called a student an inappropriate name.⁶ During a meeting with Principal Brown and Assistant Principal Hall, Brown verbally warned Roche not to call students derogatory names and to

⁵ In November of 2013, Hitchcock had been Millbury School Superintendent for 7 years.

⁶ After a student bounced a non-recyclable item into a recycling bin, Roche asked the student, "what are you, a moron?"

consistently treat students with respect.⁷ Roche apologized for the incident. Brown told Roche after the meeting that he would not place a letter in Roche's personnel file. Brown did not memorialize the January 2012 verbal warning to Roche in writing.⁸

2011-2012 School Year Overview

During the 2011-2012 school year, Roche taught one 8th grade English class and four 8th grade history classes. Roche had 25 students in 7th period history, his last class of the day, including HC and numerous other high profile students. HC consistently arrived to class late, entered the classroom in a boisterous manner, and disrupted class with inappropriate conduct. To address her conduct, Roche frequently warned that he would "write her up," which meant that he would refer her to Assistant Principal Hall for discipline. However, Roche gave HC many "last, last chances."

⁷ I make this finding based on Roche's cross-examination testimony that the contents of the January 6, 2012 letter are factually accurate.

⁸ There is conflicting testimony about whether Brown memorialized the verbal warning in a January 6, 2012 letter to Roche. According to Roche, Brown told him after the meeting that he would not place a letter in Roche's personnel file. However, Hitchcock insisted during her testimony that Brown gave Roche "a verbal warning in writing" regarding the incident. For the following reasons, as well as witness demeanor, I do not credit Hitchcock's testimony that Brown memorialized the verbal warning in writing. First, Hitchcock acknowledged that the January 6, 2012 letter was not in Roche's personnel file until she placed it there in the Fall of 2013. Second, Hitchcock's testimony on redirect that Brown told her about the January 2012 incident and that he "wrote something about it" conflicts with her testimony on direct that in January of 2012 Brown told her that he gave Roche a verbal warning by having a conversation. Third, Hitchcock's assertion that Brown "wrote something" is too vague to establish that Brown issued the January 6, 2012 letter to Roche, especially considering that Hitchcock could not identify how Brown's January 6, 2012 letter came to her attention before she ordered the Director of Information Technology (IT) to search Brown's archived computer files. Fourth, there is no evidence that Brown issued the January 6, 2012 letter to Roche in accordance with regular practices and procedures. Finally, the January 6, 2012 letter that IT found in Brown's computer files misspells Roche's name, inaccurately dates the underlying incident, and is not on letterhead.

Between September of 2011 and June of 2012, Roche referred HC to Hall on at least four occasions, three times for tardiness and once for defiant conduct. Over the course of the 2011-2012 school year, Hall disciplined HC a total of eight times for fighting, swearing, tardiness, disruptive behavior, excessive absences, and texting during an exam. The discipline that Hall imposed included discussions with HC, discussions with her parents, detentions, and a three-day suspension. On June 1, 2012, a paraprofessional administering one of Roche's exams caught HC texting during the exam.⁹ HC's father, JC, was to meet with Hall and retrieve his daughter's confiscated cell phone on June 5, 2012.

June 5, 2012 Events¹⁰

On June 5, 2012, about 15 minutes into Roche's 7th period history class, an announcement over the public address system directed 8th grade students to report for an assembly regarding student elections. The students were excited and noisy. Roche said "yahoo" in a low voice. As the students stood and started moving into the hall, HC rushed from the back of the classroom to the front where Roche stood. When HC was less than a foot away from Roche, she yelled loudly in his face, "yahoo!" As HC passed

⁹ Roche testified that this incident transpired on June 4, 2012. However, I rely on HC's Conduct History which records the incident as having occurred on June 1, 2012.

¹⁰ Roche was the only witness with direct knowledge of the June 5 incident to testify at the arbitration. I do not credit the summary statements in the Employer's July 17, 2012 Investigation Report from individuals that did not testify at the arbitration because I could not observe their demeanor and assess their credibility.

Roche and yelled in his face, he put his hand out to detain her and to make a point.¹¹ Roche briefly wrapped his right hand around HC's left wrist, stopping her.¹² He asked her, "why do you always have to act foolish and be the loudest?"¹³ HC appeared momentarily stunned, turned red, and exited the classroom without saying a word. Roche and the students reported to the auditorium. After the assembly, Roche and the students returned to the classroom. Shortly thereafter, the students' school day ended.

After school, at about 2:30 p.m., HC's father, JC, arrived at the Middlebury Junior/Senior High School's main office and demanded to see Principal Brown. Vasil informed JC that Brown was unavailable, and offered to get Hall. JC, who was upset, informed Vasil that he would not speak to Hall, and that he would go to Hitchcock if he could not speak with Brown. Vasil then invited JC into her office to discuss his problem.

Vasil and JC met for about 15-20 minutes. JC was "irate" and "loud." He told Vasil that his daughter arrived home from school and told him that Roche had "grabbed" her in class. JC informed Vasil that "[n]obody is going to touch my daughter." He did not explain why he thought Roche touched his daughter, but said that Roche and his daughter had ongoing issues. JC's primary concern was whether Roche would admit to

¹¹ There is conflicting evidence about whether Roche wrapped his hand around HC's wrist. On direct examination, Roche testified that he placed his open palm on HC's wrist. However, during cross-examination, he stated, "I put my hand out to detain her. I might have – I don't think I wrapped my hand around her wrist, if that is the question." Roche's acknowledgement that he "might have" wrapped his hand around HC's wrist undermines his initial assertion that he only placed his open palm on her wrist. Therefore, I find that Roche wrapped his hand around HC's wrist.

¹² There is no testimony establishing that Roche moved his feet in order to pull HC slightly aside, out a line of students, or from the hall into the classroom. Therefore, I conclude that Roche stopped HC, but did not pull her anywhere.

¹³ Neither attorney asked Roche during the arbitration whether he yelled at HC. Therefore, I concluded that Roche spoke to HC in a normal tone of voice.

“putting his hands on” HC. Vasil said that she wanted to talk with Roche. JC said he understood that there could be another side to the story. Vasil’s meeting with JC ended after she told him that would look into the issue and call him the following morning.

After meeting with JC, Vasil called Hitchcock and then Roche.¹⁴ Vasil first called Hitchcock to warn her that JC might call because he was upset and had alleged that Roche grabbed HC during class. Hitchcock did not know JC. Vasil assured Hitchcock that she would “get to the bottom of it.” Hitchcock told her to call her if needed. Vasil then called Roche and told him to come to her office. Roche asked Vasil if the issue concerned HC’s cell phone because JC was to retrieve HC’s confiscated cell phone from Hall that afternoon. Vasil said she knew nothing about the cell phone issue and needed to speak with him about the incident with HC in class that day.

When Roche arrived in Vasil’s office, she explained that JC had accused Roche of touching HC, and asked for Roche’s side of the story. Roche told Vasil that after the announcement for the 8th grade assembly, the students commented on the assembly and Roche said, “yahoo” to which HC said, in his face, “yahoo.” Roche told Vasil that he took HC by the arm to pull her aside, and asked HC “why do you always have to act

¹⁴ Vasil initially testified that she called Roche right away. She later clarified that she called Hitchcock twice that afternoon, before and after Roche came to her office. Hitchcock could not remember how many conversations she had with Vasil on June 5.

so foolish?”¹⁵ At first, Roche demonstrated to Vasil that he took HC by the wrist to pull her aside. Roche did not say the word “grabbed,” but demonstrated wrapping his hand around HC’s wrist.¹⁶ Later in the conversation, Roche told Vasil that he thought he took HC by the elbow and tried to pull her aside. In response to Roche’s acknowledgement that he had touched HC, Vasil said, “[t]hat’s something that we absolutely can’t do.” Roche explained that this was not the first time HC had acted foolishly, and that he didn’t mean to hurt HC and was just trying to get her attention. Vasil suggested a meeting with Roche, Hall, and HC’s parents to resolve the June 5 issue. Roche agreed to the meeting.

After meeting with Roche, Vasil called Hitchcock and told her that she planned to hold a meeting the follow day with Hall, Roche, and HC’s parents to discuss the issue

¹⁵ Although there is no dispute that Roche told Vasil that he touched HC on the arm, the record contains other conflicting details about their June 5 conversation. Vasil testified that after Roche said he took HC by the arm, he told her two variations of where he touched HC on the arm. According to Vasil, Roche first demonstrated holding HC by the wrist to pull her aside, and then later in the conversation said that he took HC by the elbow to pull her aside. Roche testified that he did not “remember explaining it that way” to Vasil on June 5. According to Roche, he told Vasil that he put his hand out to “detain” HC, his hand on her wrist. The Investigation Report contains conflicting information about these details. For the following reasons, as well as witness demeanor, I credit Vasil’s testimony. First, Roche’s failure to remember is not a denial of Vasil’s assertions. Second, Roche acknowledged that he might have wrapped his hand around HC’s wrist. Third, Roche did not deny explicitly that he told Vasil two variations of where he touched HC on the arm.

¹⁶ Vasil initially testified that Roche reported to her that he “grabbed” HC, but stopped mid-sentence to clarify that Roche had not used that word. Upon reviewing the Investigation Report, Vasil asserted that Roche told her on June 5 that he grabbed HC. I do not credit her testimony on this point. First, during her initial testimony Vasil made a point of correcting herself to clarify that Roche did not use the word “grabbed” with her on June 5. Second, her affirmation of the Investigation Report in which she stated, “from this report, I would say that is what he said to me,” evinced no independent recollection that Roche used the word “grabbed” to her on June 5.

and to see how they could move forward. Hitchcock, who did not plan to participate in the meeting, was perfectly fine with that plan and told Vasil to call her if needed.

June 6, 2012 Events

Vasil called HC's parents before 8:00 a.m. on June 6, 2012 and spoke to HC's mother, LC. Vasil explained that she had talked to Roche and that he had put his hands on HC without meaning to be hurtful. Vasil suggested that everyone to sit down together and talk about the incident. LC said that she would have to talk to her husband. Vasil overheard JC tell LC, "[t]hat's it. No meeting. I am calling the Superintendent." JC then told Vasil that she would call her back after discussing the matter with her husband.

Subsequently, JC called Hitchcock and told her that Roche "assaulted" his daughter and "bullied" her every day. Hitchcock let JC vent and then clarified his meaning of "assault." JC told Hitchcock that Roche had "grabbed" HC's arm in the classroom, as the students were going to the auditorium. JC explained that Roche said, "yahoo," to which HC loudly repeated "yahoo." The word "assaulted" got Hitchcock's attention, but she did not find that the incident required a 51A report.¹⁷ At least three times during the conversation, JC told Hitchcock that he would not go to the meeting with Vasil because he did not want to hear what Roche had to say. Hitchcock told JC that she would probably need to conduct an investigation. Principals normally handle

¹⁷ M.G.L. c.119, s.51A requires a mandated reporter who, in her professional capacity, has reasonable cause to believe that a child is suffering physical or emotional injury resulting from abuse inflicted upon her which causes harm or substantial risk of harm to the child's health or welfare to immediately communicate with the Department of Children and Families (DCF) orally and, within 48 hours, file a written report with the DCF detailing the suspected abuse or neglect.

conflicts that arise in their buildings, but Hitchcock got involved in this instance because JC wasn't going to take anything else for an answer. After speaking with JC, Hitchcock called Vasil and told her that HC's parents were not coming in for the meeting and that she would place Roche on paid administrative leave pending an investigation.

Later in the school day, Hitchcock held a meeting in her office with Hall, Vasil, Roche, and Association Representative Jeff Lyon (Lyon) to discuss the need for an investigation. Hitchcock chaired the meeting and did most of the talking. She told Roche that a parent had accused him of touching a student and that a full investigation was necessary, as soon as Hitchcock could find a person to conduct the investigation. When Roche asked why she was going to investigate, she told him that, "[t]he parents filed a complaint and now it has to be investigated."¹⁸ She went on to say, "[w]e can't let this drop. We need to find out what really occurred." Hitchcock placed Roche on paid leave and prohibited him from campus. After Roche pointed out that he had to administer and grade exams, Hitchcock agreed that he could come to school after students left the building. Hitchcock did not ask Roche any questions about the incident with HC because the purpose of the meeting was not investigatory. This was the only conversation that Hitchcock had with Roche regarding the June 5 incident. After the

¹⁸ I credit Hitchcock's un rebutted testimony that she made this statement to Roche during the June 6 meeting. However, there is no evidence that HC's parents actually filed a written complaint prior to June 6, 2012. Therefore, I conclude that Hitchcock's assertion that the parents filed a complaint refers to JC's telephone call to her.

meeting, Hitchcock directed Frederick to conduct an investigation.¹⁹ On June 6, Vasil issued a letter that states, in relevant part:

Effective today, June 6, 2012, I am placing you on paid administrative leave until my investigation has been completed regarding the incident that occurred yesterday, June 5, 2012, in your classroom. As I have informed you in the presence of Union Representation, it was reported that you allegedly grabbed the wrist of a female student in your classroom. You may not return to work until I notify you that the investigation is complete and we meet to discuss the findings of this investigation.

I will contact you via phone to inform you when the meeting will take place. Please note that this letter will be placed in your personnel file.

Roche had no further conversations with the Employer about the reasons for his administrative leave until Frederick interviewed him on June 15, 2012.

Frederick's Investigation

On June 11, 2012, Frederick conducted the first investigatory interviews with HC and her mother.²⁰ At unidentified points in time, Frederick also interviewed 13 of the 25 students in Roche's 7th period history class.²¹ She emphasized to the students that the matter was confidential. Although Frederick began each student interview by asking

¹⁹ In November of 2013, Frederick had been Elmwood Street Elementary School Principal of the pre-k to grade 3 building for 6 years. Frederick testified that she had conducted "several" teacher misconduct investigations but provided no testimony in support of this assertion.

²⁰ On Friday, June 8, 2012, LC sent Hitchcock an email regarding the incident between Roche and HC, and other allegations. Hitchcock gave the email to Vasil, but did not remember if she gave it to Frederick. Frederick and Vasil did not testify about the email. I do not consider the email because the allegations contained in the email are unsubstantiated hearsay. Further, there is no evidence that the June 8 email played any role in Roche's suspension.

²¹ Frederick testified that there were 10-15 students in Roche's class. Roche testified that there were 25 students. I credit Roche because Frederick did not testify about the basis of her knowledge on this point.

whether the student witnessed “an interaction” between HC and Roche, her interview questions ranged well beyond the June 5, 2012 incident to general information about Roche’s 7th period history class. Frederick interviewed Roche, accompanied by Lyon, on June 15, 2012. On June 19, 2012, Frederick interviewed Vasil. After Vasil’s interview on June 19, but before writing her findings, Frederick submitted her interview notes to Hitchcock and they discussed Frederick’s unwritten findings and opinion.²² Frederick subsequently wrote the Investigation Report.²³

Hitchcock’s Pre-Investigation Report Discipline Discussion With Vasil

After Frederick submitted her interview notes to Hitchcock, Hitchcock and Vasil discussed and formulated the level of discipline for Roche.²⁴ Hitchcock “felt very strongly” that Roche should be suspended for two days because a few months earlier, she had determined that the Elmwood teacher who pushed a student’s hands down for making raccoon eyes deserved a two day suspension. Hitchcock wanted Roche’s discipline to be consistent with the Elmwood teacher’s two day suspension.

Hitchcock considered Roche’s contact with HC to be similar to the Elmwood teacher’s contact with the student making raccoon eyes because neither Roche nor the Elmwood teacher punched or hit the students, but both teachers touched the students to make a point. Hitchcock looked at the type of action the teachers took, and the

²² I credit Frederick’s testimony on this point because Hitchcock could not remember meeting with or talking to Frederick before Frederick wrote the Investigation Report.

²³ Frederick testified that Hitchcock did not influence her findings or opinion. In light of her discussion with Hitchcock, I do not credit her testimony on this point.

²⁴ Hitchcock initially testified that she and Vasil had this conversation after she shared the Investigation Report with Vasil. She subsequently clarified that she had this conversation with Vasil after she reviewed Frederick’s investigation notes.

degree of severity used in touching the students to make a point. Hitchcock considered the Elmwood incident, which she had seen on video, and Roche's description of the incident to Vasil on June 5 to be equivalent because both teachers were disrespectful and did not conduct themselves as a quality teacher would when making a point to a student. Hitchcock testified that she stayed away from labeling Roche's contact with HC as an "assault" or as a "grab." To her, the bottom line was that both teachers touched the students. Hitchcock evaluated only Roche's physical contact with HC on June 5, not his statements. Additionally, she knew at the time she initially formulated Roche's discipline with Vasil that Roche had a January of 2012 verbal warning from Brown for calling a student a derogatory name. However, that incident had nothing to do with Hitchcock's initial decision to suspend Roche for two days.

Pre-Investigation Report Settlement Discussions

On an unidentified date before Frederick issued the Investigation Report, Vasil telephoned Roche to discuss settlement.²⁵ During the conversation, Vasil told Roche that she would like to put the incident behind them and move on, and asked Roche if he would agree to disciplinary settlement agreement with a two day suspension. Roche told Vasil that he wanted to review the agreement and that he would not sign off on anything without knowing about the accusations in Frederick's Investigation Report. A few days later, Roche and Vasil met and she gave him a sample disciplinary settlement agreement with a two day suspension. Roche told her that he would talk to his lawyer.

²⁵ Hitchcock testified that around the last week in June, after she reviewed Frederick's investigation notes, she told Roche that she was considering a two-day suspension. Hitchcock subsequently testified that she could not be sure about when she told Roche she was considering a two-day suspension. I do not credit Hitchcock's assertion that she had a conversation with Roche because it is vague and unsupported by other facts.

He also reiterated that he would not sign the agreement without seeing the Investigation Report. Roche also commented that the incident with HC warranted little more than a warning in his file. Vasil agreed that was all it would have been if the incident at the Elmwood School had not occurred.

Frederick's July 17, 2012 Disciplinary Investigation Report

Frederick issued the Investigation Report on July 17, 2012. Based on her interviews, Frederick determined that on June 5, 2012, Roche "grabbed [HC] by the arm and pulled her back into the classroom and proceeded to yell at her." Frederick found that "[a]lthough Mr. Roche stated during the interview that he only put his hand out to stop Complainant from exiting the classroom, four students who witnessed the incident corroborated that Mr. Roche grabbed her arm or placed his hand on Complainant in order to pull her back into the classroom."²⁶ Therefore, Frederick concluded that Roche "had inappropriate physical contact with a student, was disrespectful towards the student and, as a result, engaged in conduct unbecoming a teacher."

Post-Investigation Report Settlement Discussions

Vasil called Roche again regarding the disciplinary settlement agreement after Frederick issued the July 17, 2012 Investigation Report. Roche told Vasil that he would come back early from vacation to discuss it with her. A few days later, on Friday, July 20, 2012, Roche met with Vasil. During the meeting, Vasil told Roche to sign off on the agreement or she would have to increase the penalty by two days. They also discussed

²⁶ On direct examination, Frederick testified that "I don't believe [Roche] said he made contact" during his interview. She further testified that her "understanding" based on Roche's statement that he put his arm out to stop HC was that Roche did not touch HC at all. However, Frederick failed to establish that she asked Roche whether he touched HC. Therefore, I do not conclude that Roche denied touching HC during the investigatory process.

the Elmwood incident again. Roche told Vasil that he could not sign the disciplinary settlement agreement, and that he would take it to the next level.

July 20, 2012 Notice of Intent to Suspend

On July 20, 2012, the same day that Roche rejected the Employer's disciplinary settlement agreement, Vasil issued the Notice of Intent to Suspend, that states, in relevant part:

This letter constitutes notice to you, as required by Section 42D of Chapter 71 of the Massachusetts General Laws, that I intend to suspend you for a period of four (4) consecutive school days, from August 27, 2012 through August 30, 2012. This intent to suspend is based on the finding that you had physical contact with a student, lost control of your temper while communicating with a student, and behaved in a manner unbecoming a teacher.

Pursuant to Section 42D of Chapter 71, you have the right to request a review of this intended decision with me and to be represented by counsel or an Association representative at such meeting. If you do request such a meeting, you will have the right to provide information pertinent to my decision and to your status.

Please notify me as soon as possible, but no later than August 6, 2012, if you would like to schedule a meeting, and whether you intend to bring an attorney to that meeting.

Please note that any future behavior similar to this may result in further disciplinary action up to and including termination.

A copy of this letter will be placed in your personnel file.

Roche received the letter on July 21, 2012.

Hitchcock testified that she decided to increase Roche's penalty from a two day suspension to a four day suspension because:

[Roche] took the position that he didn't do it after he admitted to Mrs. Vasil that he did. He was asked to respond to the suspension for two days and did not. Just didn't respond. And it went for much of the summer and [he] just didn't respond. So in order to try to get his attention that we needed a response or we need to do something with this, we added another two days.²⁷

August 17, 2012 Suspension Notice

On August 17, 2012, Vasil issued Roche a Suspension Notice that states, in relevant part:

Pursuant to M.G.L., Chapter 71, §42D, at your request, I convened a meeting on August 15, 2012, relative to my intended decision to suspend you for a period of four (4) consecutive school days for the reasons set forth in my July 20, 2012 notice of intent to suspend. At the meeting, you were provided a reasonable opportunity to review my intended decision to suspend you, to respond to the School District's allegations and to present information pertaining to the basis for my intended decision, which you did through your counsel Attorney Houle.

Based upon my review of the matter and my meeting with you on August 15, 2012, I am confirming your suspension without pay for a period of four (4) consecutive school days, effective August 27, 2012 through August 30, 2012. Pursuant to M.G.L. c 71, §42D, you may seek review of this decision by filing a petition for arbitration with the Commissioner of Education.

Any future behavior similar to this may result in further disciplinary action up to and including termination.

A copy of this letter will be placed in your personnel file.

²⁷ There is no evidence that Roche denied touching HC. Roche's decision not to sign the disciplinary settlement agreement is a rejection of the settlement offer, not a denial that the incident occurred. There is also no evidence that Roche "just didn't respond" to the settlement offer for much of the summer. Roche repeatedly told Vasil that he would not sign the disciplinary settlement agreement without seeing the Investigation Report. On July 20, 2012, only three days after Frederick issued the Investigation Report, Roche rejected the disciplinary settlement agreement.

On the same day, Roche filed a petition for arbitration with the Department of Elementary and Secondary Education.

POSITIONS OF THE PARTIES

Employer

Authority

The Arbitrator has no authority to decide Roche's grievance. First, the Employer suspended Roche pursuant to M.G.L. c.71, s.42D and therefore, statutory arbitration is Roche's sole remedy. Section 42D requires that employers suspend teachers in accordance with negotiated agreements but does not require employers to adhere to negotiated grievance and arbitration procedures. The Court in Serrazina v. Springfield Public Schools, 80 Mass. App. Ct. 617 (2011), recognized that M.G.L. c.71, s.42D is the statute "generally applicable" to school district employee suspension and that s.42D incorporates the review procedures set forth in s.42. Therefore, Arbitrator should not permit Roche to bypass the procedural requirements of c.71, s.42.

Second, the Arbitrator has no authority because Article XXII of the Agreement, Management Rights, provides that the Employer has the right to "demote, suspend, discipline and discharge subject to M.G.L. Chapter 71" and that "[t]he exercise of the rights contained herein shall not be a matter subject to grievance or arbitration under Article IV of the Agreement." Thus, Article XXII prohibits Roche from arbitrating his suspension under the Agreement. Instead, Roche is permitted to seek review of his suspension pursuant to c.71, s.42.

Third, the Arbitrator has no authority because c.71, s.42 and s.42D supersede the terms of the Agreement as they are not enumerated in M.G.L. c.150E, s.7(d).

Finally, the Employer's failure to raise the management rights language as a prohibition to the arbitration prior to the hearing does not affect the validity of the argument. This issue is a substantive, jurisdictional issue that prevents the Arbitrator from acting, akin to a jurisdictional prerequisite or statute of limitations.

Merits

The Employer had just cause to issue the August 17, 2012 four day suspension to Roche for making physical contact with a student and inappropriate conduct, both of which constitute conduct unbecoming a teacher. Roche's admissions alone are more than enough to show that he deserved at least a two day suspension for his misconduct. He admitted that he made physical contact with HC and that he asked her in front of the class, "[w]hy do you always have to act foolish and be the loudest?" He further admitted that she was "a little stunned" by his comments. Additionally, Roche's intentional touching of HC to stop her behavior, which he characterized as "foolish" and "loudest," was clearly designed to be punitive. Roche's actions were essentially identical to those taken by the Elmwood teacher less than two months earlier for which the Employer imposed a two day suspension. Furthermore, the Employer had admonished Roche earlier in the school year for calling a student a moron. Thus, Roche was on notice that name calling was unacceptable. Consequently, the Employer's decision to impose a two day suspension was consistent with earlier discipline meted out and therefore meets the just cause standard.

The Employer increased Roche's suspension from two to four days because of his unwillingness to accept responsibility for his misconduct. On the day of the incident, Roche admitted to Vasil that he made physical contact with HC. During the

investigation, Roche told Frederick that he merely put his hand up to stop HC from advancing forward, which is entirely different than placing his hand on her. Roche's complete failure to respond to the Employer's proposed resolution over an attenuated period (virtually the entire summer) demonstrated Roche's failure to accept responsibility for his actions and influenced Hitchcock's decision to increase Roche's discipline. It was not his refusal to agree to the proposal that frustrated Hitchcock, it was the fact that he ignored the Employer's efforts to conclude the matter.

The focus for Hitchcock was not how Roche made contact with HC, but that similar to the Elmwood teacher, Roche intentionally touched a student in a manner that was not compassionate or intended to be supportive. The contact was to stop behavior and therefore was punitive in measure. Hitchcock has worked hard over the last six years to implement consistent disciplinary standards in the District. Also, her "theme" in the District has been the importance of professional behavior, and she shares this theme annually with the employees of the District. Roche has worked in the District for 19 years, throughout Hitchcock's tenure as Superintendent. It would, therefore, be disingenuous for him to claim that he was not familiar with the Superintendent's emphasis on professionalism. Further, as a staff member, he received the Employee Handbook which also emphasized these values.

It would be incredulous, for Roche, a teacher with over 30 years of teaching experience, to claim that he did not know it is inappropriate to touch a student in the manner in which he did. As an experienced teacher, he knows not to place his hands on a student to correct disfavored student behavior. Accordingly, there was just cause for the four day suspension, and the grievance should be denied.

AssociationAuthority

Roche's grievance is arbitrable under the Agreement. M.G.L. c.71, s.42D is clear that a teacher may pursue review of a suspension either through the procedures in Section 42 or through procedures negotiated in a collective bargaining agreement. Nothing in the language of Section 42D establishes it as the exclusive option for arbitral review. Further, the Section 42D language that, "[n]othing in this section shall be construed as limiting any provision of a collective bargaining agreement with respect to suspension of teachers," articulates the legislative intent to preserve the right to seek suspension review through procedures set forth in a collective bargaining agreement. M.G.L. c.150E, s.8, which provides public sector employees with the right to collectively bargain a grievance arbitration process, supports the Association's position. Section 8 grants public employees, including teachers, the right to elect the mechanism for review of the merits of a suspension, notwithstanding M.G.L. c.71, s.42 or s.42D.

Further, when viewed in the context of the Agreement as a whole, the management rights clause does not clearly and unambiguously state that discipline is not subject to the grievance and arbitration procedures in Article IV of the Agreement. The Agreement contains a comprehensive grievance and arbitration procedure. Article IV defines a grievance as "any dispute involving the meaning, interpretation or application of this Contract." Article VIII, section D provides that "[n]o bargaining unit member will be disciplined or reprimanded through a reduction in rank or compensation or deprived of any professional advantage without just cause." The management rights listed in Article XXII are expressly limited by specific provisions of the Agreement.

Therefore, the just cause standard limits the Employer's right to discipline bargaining unit members.

The Employer's decision to process Roche's grievance through all of the grievance steps without arguing that Roche's suspension was not grievable is evidence that the Employer also viewed the suspension as subject to Article IV. Additionally, the sample settlement agreement that the Employer offered to Roche contained a provision requiring Roche and the Association to waive any grievance or arbitration appeal in any forum. This language is evidence that the Employer believed that suspensions were subject to Article IV. Therefore, the Arbitrator should find that the parties' negotiated a contractual just cause standard which is enforceable via their negotiated grievance and arbitration procedures.

Merits

The Employer did not have just cause to issue the August 17, 2012 four day suspension to Roche. First, the Employer failed to meet its burden of establishing that Roche engaged in the conduct for which he was suspended. The Employer suspended Roche "based on the finding that [he] had physical contact with a student, lost control of [his] temper while communicating with a student, and behaved in a manner unbecoming a teacher." The Employer's Investigator determined that that Roche "grabbed [HC] by the arm as she was exiting the classroom, that he pulled her back into the classroom and yelled at her" and concluded that Roche had "inappropriate physical contact with a student, was disrespectful towards the student and, as a result, engaged in conduct unbecoming a teacher." However, the Arbitration record does not establish that Roche grabbed HC, pulled her, or yelled at her. The Arbitrator should give no credence to the

Investigation Report, which constitutes hearsay. The Employer could have issued subpoenas to HC and the other student witnesses but it did not.

Second, the suspension cannot stand because the Employer violated Roche's Section 42D due process rights and conducted a deficient investigation. M.G.L. c.71, s.42D provides that "[n]o teacher shall be interrogated prior to any notice given to him relative to the suspension unless the teacher or other employee is notified of his right to be represented by counsel during any such investigation." On June 5, Vasil began the investigation without giving Roche notice of his right to be represented by counsel. Both Frederick and Hitchcock relied heavily on Roche's alleged statement to Vasil on June 5. Due to this substantive procedural and due process violation, the Arbitrator must not give any weight or credit to the Employer's reliance on what it claims Roche said to Vasil on June 5. Additionally, the Employer's investigation was riddled with flaws and shortcomings. Frederick delayed witness interviews, credited only statements she believed were consistent with HC, and failed to ask probative questions.

Third, the Employer had no clear policy or rule prohibiting this type of "touching." Hitchcock testified that her primary basis for suspending Roche was that he engaged in a "touching to make a point" and cited the Employee Handbook as setting forth a policy that prohibited touching of students. However, the Employee Handbook does not address the issue. Moreover, Roche had an obligation under the Handbook's anti-bullying provision to prevent HC's disruptive behavior. Given the complete lack of policy on the issue of touching a student, there was no way for Roche to know that touching to make a point could lead to discipline. Guiding HC aside to discuss her behavior did not violate any clear policy or show disrespectful treatment. Additionally, in the context of

the incident where HC was acting foolish, Roche's question to her about why she had to act the most foolish is not clearly disrespectful.

In the absence of a clear policy regarding touching, the Employer was obliged to start at the lowest level of discipline, an oral reprimand, in order to ensure that Roche understood the Employer's expectations. The Employer cannot rely on the prior Elmwood School incident to support a Roche's suspension because the disciplinary agreement given to that teacher expressly stated that it was non-precedential and not to be used to establish a practice in terms of discipline in future cases. Even if the Elmwood incident were an appropriate comparator, it demonstrates that Roche's four day suspension was excessive and out of line with Hitchcock's purported efforts to institute disciplinary consistency.

Not only was there no just cause for Roche's suspension, but the Employer retaliated against Roche by adding two more days to his suspension when he refused to sign away his appeal rights. Hitchcock provided no reasonable and justifiable explanation for adding two more days to the suspension. It is unacceptable to increase a level of discipline because an employee refuses to accept the discipline that an employer seeks to impose. The four day suspension was punitive rather than corrective, which is inconsistent with the purpose of discipline. Hitchcock's conduct violated Article IV E of the Agreement and further supports the conclusion that there was no just cause for Roche's four day suspension.

This case is similar to Holliston Sch. Comm., AAA Case No. 11 390 01096 95, at 8 (Wolfson, Arb. 1995) where the arbitrator found that the teacher's behavior in putting a hand on a student's shoulder and instructing him to return to his seat was not

inappropriate. The arbitrator noted that the teacher “was merely trying to get an inattentive student to follow directions.” Similarly, here Roche was simply trying to get the attention of a raucous student before she was disruptive in the halls or bumped into someone. Nothing was inappropriate in his actions.

Finally, considering Roche’s lengthy and overwhelmingly positive work history, the Arbitrator should find that no suspension was warranted or necessary to address the incident at issue. Therefore, the Arbitrator should find that there was no just cause for suspending Roche for four days, order that the discipline be rescinded and expunged from Roche’s personnel file, and further order that he be made whole.

OPINION

Authority

There is no dispute that the Employer notified Roche by letter dated July 20, 2012, “as required by Section 42D of Chapter 71,” that it intended to suspend him for four days, and that he had the right to pursuant to Section 42D to request a review of the intended decision. Likewise, the Employer’s August 17, 2012, suspension notice to Roche confirmed Roche’s four day suspension, and stated “[p]ursuant to M.G.L. c. 71, §42D, you may seek review of this decision by filing a petition for arbitration with the Commissioner of Education.”

I turn first to the Employer’s argument that the Arbitrator does not have the authority to decide Roche’s grievance because the Employer’s Article XXII right to suspend employees subject to Chapter 71 is not subject to Article IV arbitration. Article XXII, Management Rights provides:

The rights, powers, responsibilities and authority of the Millbury School District shall include but not be limited to the following, except to the extent

that such rights are expressly limited by specific provisions of this Agreement or by statute: To . . . to demote, suspend, discipline and discharge subject to MGL Chapter 71 and subject to just cause for bargaining unit members with professional status In addition to the provisions of this Agreement, all laws and rules or regulations applicable to a bargaining unit member's rights and responsibilities will continue to be considered to be in full force and effect, nor should anything contained herein be interpreted to permit for the subcontracting of services currently performed by members of the bargaining unit, except where presently practiced (i.e. substitute teachers and long-term substitute teachers). The exercise of the rights contained herein shall not be a matter subject to grievance or arbitration under Article IV of the Agreement.

The Employer emphasizes that the last sentence of Article XXII states that, "[t]he exercise of the rights contained herein shall not be a matter subject to grievance or arbitration under Article IV of the Agreement." However, this argument rests on a crabbed interpretation of Article XXII that ignores the rest of the Agreement.

The Employer's Article XXII right to suspend is limited in two respects. First, the list of enumerated rights in Article XXII grants the Employer the right to suspend "subject to M.G.L. Chapter 71 and subject to just cause for bargaining unit members with professional status." The conjunction "and" indicates that the Employer's right to suspend subject to Chapter 71 is also subject to just cause for teachers with professional status. In the absence of the conjunction "or" I do not find that the Employer can choose between alternative methods of suspension for teachers with professional status. Second, the opening sentence of Article XXII states that the enumerated management rights rights "are expressly limited by specific provisions" of the Agreement. Article VIII, Section D, provides that, "[n]o bargaining unit member will be disciplined . . . without just cause." Thus, Article VIII, Section D is a specific provision of the Agreement that expressly limits the Employer's right to suspend. There is no evidence that the parties bargained to exclude Chapter 71 suspensions from the

Article VIII, Section D just cause provision. Accordingly, I do not find that the last sentence of Article XXII clearly and unambiguously removes Chapter 71 suspensions from Article IV arbitrations.

I next turn to the Employer's argument that the Arbitrator has no authority to decide Roche's grievance because the Employer suspended Roche pursuant to Chapter 71 and statutory arbitration is Roche's sole remedy. For reasons stated above, Chapter 71 suspensions do not preclude Article IV arbitrations. Article IV defines a grievance "as any dispute involving the meaning, interpretation or application" of the Agreement, provided that the matter is specifically covered by the Agreement and not reserved to the discretion of the Employer. Article IV, Section G(4) permits the parties to refer unresolved grievances to arbitration. Here, Roche's September 28, 2012 arbitration petition alleges that the Employer suspended him for four days without just cause. Thus, Roche's arbitration concerns an unresolved grievance that is a dispute about whether the Employer violated Article VIII, Section D by suspending him without just cause. For reasons stated above, I do not find that suspension is a matter reserved to the discretion of the Employer by the terms of the Agreement.

The Employer also argues that Roche is limited to statutory arbitration because M.G.L. c.71, s.41 and s.42D are not enumerated in M.G.L. c.150E, s.7(d) and supersede the Agreement. Section 42D grants superintendents the power to suspend employees and provides that suspended employees "may seek review of the suspension" by filing for arbitration pursuant to Section 42. Additionally, Section 42D explicitly states that, "[n]othing in this section shall be construed as limiting any provision of a collective bargaining agreement with respect to suspension of teachers."

Thus, Section 42D requires the Employer to apply the terms of the Agreement “with respect to teacher suspensions.” The fact that the phrase says nothing about the grievance or arbitration of a suspension is immaterial because a suspended teacher “may,” but is not required to seek review of the suspension pursuant to Section 42. Therefore, I dismiss the Employer’s argument that Roche is limited to statutory arbitration. For all of the reasons stated above, I conclude that I have the power and authority to hear and decide Roche’s grievance.

Merits

By letter dated August 17, 2012, the Employer suspended Roche “based on the finding that [he] had physical contact with a student, lost control of [his] temper while communicating with a student, and behaved in a manner unbecoming a teacher.” Although the Employer failed to establish its allegation that Roche lost control of his temper during the incident, I find that Roche briefly held HC’s wrist to address her disruptive behavior.²⁸ Section I of the Handbook requires that teachers “demonstrate a professional, cooperative, knowledgeable and courteous demeanor in all interactions with students.” Roche’s physical contact with HC lacked courtesy. Thus, Roche’s June 5 conduct violated Section I of the Handbook. Accordingly, the Employer had sufficient reason to impose discipline.

However, I do not find that the Employer had just cause to suspend Roche for four days. First, Hitchcock decided to impose two of the four days based on the prior

²⁸ In light of Roche’s admission that he touched HC to address her disruptive behavior, I need not address the Association’s arguments that the Employer violated Roche’s Section 42D due process rights in considering his June 5 statements to Vasil and conducted a defective investigation.

disciplinary settlement agreement between the Employer and the Elmwood teacher. The Elmwood teacher's disciplinary settlement agreement stated, in relevant part that "[t]his Agreement shall be without precedent to the rights of the District or the Association in connection with any other matter concerning disciplinary and/or administrative leave issues, and will not constitute a practice or precedent between the parties." Therefore, the Employer agreed not to use the Elmwood teacher's disciplinary settlement agreement as a guide in considering subsequent similar circumstances. Accordingly, Hitchcock improperly relied on the Elmwood teacher's two day suspension in formulating Roche's discipline.

Second, Hitchcock increased Roche's penalty from a two day suspension to a four day suspension to get Roche to accept the disciplinary settlement agreement. An employee's decision not to accept a settlement agreement is not grounds for discipline. Thus, neither aspect of Hitchcock's disciplinary rationale was appropriate, and I reject the Employer's argument that Roche's failure to accept responsibility justifies his four day suspension. Even if this is an appropriate disciplinary standard, the Employer did not state in either the July 20 Notice of Intent to Suspend, or the August 17, 2012 Suspension Notice that it was suspending Roche for a failure to accept responsibility for his actions. The Employer cannot tack a new allegation of wrongdoing onto its disciplinary notice for the first time at arbitration.

I also dismiss the Employer's argument that Roche's intentional touching of HC to stop her behavior was punitive. Roche did not walk over to HC and take her by the wrist. Rather, he briefly held her wrist as she rushed past him, less than a foot away, and yelled in his face. Roche's brief physical contact with HC's wrist did not punish her,

it stopped her mad rush out the door and communicated the message to slow down and stop yelling. Accordingly, this instance of intentional touching to stop disruptive behavior was not punitive. For all of the reasons stated above, the Employer had no just cause to issue a four day suspension.

After weighing Roche's seniority, disciplinary record, and the nature of the offense, I conclude that there is just cause to issue a written warning. At the time of the incident, Roche had 30 years of teaching experience, having spent the most recent 18 years of his career teaching in the Millbury Public Schools. Prior to August of 2012, Roche had consistently positive performance evaluations. Although he had one prior verbal warning, Hitchcock did not consider it as a factor in Roche's discipline. Nor did Hitchcock consider Roche's verbal statements to HC to warrant discipline. Therefore, I evaluate only Roche's June 5, 2012 conduct.

Roche had an obligation to prevent HC's disruptive behavior pursuant to Section VII (C) of the Handbook. However, he was required to do so in accordance with the Section I requirements of "professional, cooperative, knowledgeable and courteous demeanor in all interactions with students." Roche's physical contact with HC lacked courtesy. Violating the courtesy rule merits a written warning. The manner in which Hitchcock and Vasil initially responded to the incident establish that the nature of Roche's offense did not constitute grave misconduct. On the afternoon of the incident, HC's father told Vasil that Roche "grabbed" his daughter and Roche demonstrated to Vasil that he held HC by the wrist to address her disruptive conduct. Yet, Vasil planned to address the matter by holding a meeting with Roche, HC and HC's parents to discuss the matter and see how they all could move forward. Hitchcock did not even see the

need to attend the meeting with the family. Thus, Vasil's and Hitchcock's reactions suggest that they were underwhelmed by the incident. Moreover, when Roche commented to Vasil during a meeting that the incident with HC warranted little more than a warning in his file, Vasil agreed. Therefore, I conclude that Roche's June 5, 2012 conduct merits a written warning. Accordingly, I reduce his four day suspension to a written warning.

CONCLUSION

For all of the reasons stated above, I do not find just cause for the Employer's four day suspension of Roche. I hereby reduce the four day suspension to a written warning.

REMEDY

Having found that the Employer violated the collective bargaining agreement in suspending Roche for four days, I now order the Employer:

to remove all references from Roche's personnel file of a four day suspension, inserting in its place a written warning; and

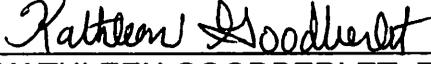
to make Roche whole for all losses of wages and benefits associated with the four day suspension.

I will retain jurisdiction for thirty days for the sole purpose of resolving remedy issues.

AWARD

The Arbitrator has the authority to hear and decide the grievance over Stephen Roche's suspension. The Employer did not have just cause to issue the August 17, 2012 four (4) day suspension to the grievant, Stephen Roche. The Employer is hereby ordered to reduce Stephen Roche's four day suspension to a written warning.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



KATHLEEN GOODBERLET, ESQ.
ARBITRATOR