

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

EVERETT SCHOOL COMMITTEE

-and-

EVERETT TEACHERS ASSOCIATION

ARB-21-8841

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Robert Galvin, Esq. - Representing Everett School Committee

Jennifer Smith, Esq. - Representing Everett Teachers Association

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

The Everett School Committee did not have just cause to terminate Kimberly Colantuoni. The District is hereby ordered to reinstate Kimberly Colantuoni to her position as a paraprofessional, to remove all references to the termination from her personnel file, and make her whole for all losses of pay and benefits sustained back to the first day of the school year in September 2021.



Timothy Hatfield, Esq.
Arbitrator
June 29, 2023

INTRODUCTION

On July 18, 2022, Everett Teachers Association (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L. Chapter 23, Section 9P, the Department appointed Timothy Hatfield, Esq. to act as a single neutral arbitrator with the full power of the Department. The undersigned Arbitrator conducted a virtual hearing via Web-Ex on March 1, 2022.

The parties filed briefs on May 13, 2022.

THE ISSUES

The parties were unable to agree on a stipulated issue. The proposed issue before the arbitrator is:

The Union proposed:

Did the Employer have just cause to terminate Kimberly Colantuoni? If not, what shall the remedy be?

The School Committee proposed:

Whether or not there was just cause for the termination of Kimberly Colantuoni? If there was no just cause for the termination of Kimberly Colantuoni, what is the appropriate remedy?

Issue:

As the parties were unable to agree on a stipulated issue, I find the appropriate issue to be:

Did the Everett School Committee have just cause to terminate Kimberly Colantuoni? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

The parties' Collective Bargaining Agreement (Agreement) contains the following pertinent provisions:

Article 6**Evaluation, Discipline, Resignation** (In Part)

1. ...
2. Paraprofessionals will be considered probationary employees for their first ninety (90) school days of employment. After completion of the probationary period, paraprofessionals will not be reprimanded, disciplined, suspended, or discharged without just cause.

FACTS

The Everett School Committee (School Committee / Employer / District) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. Kimberly Colantuoni (Colantuoni / grievant) was a paraprofessional for seventeen years and worked at the Madeline English School at the time of her termination. Francesse Canty (Canty) is the Director of Human Resources for the District, and Priya Tahiliani (Tahiliani / Superintendent) is the District's Superintendent.

In May 2019, Colantuoni took a medical leave of absence to treat breast cancer. Colantuoni returned to work in the fall of 2019 and assisted in seventh grade.

In March 2020, Governor Baker declared a state of emergency in the Commonwealth of Massachusetts due to the outbreak of COVID-19. All schools were subsequently ordered to remain closed for in-person learning. The District

transitioned to remote learning for the remainder of the 2019-2020 school year. Colantuoni performed her job duties as a paraprofessional remotely during this time. While the District had received some complaints about the work habits of some paraprofessionals during this time, they did not receive any complaints about Colantuoni's work.

In the summer of 2020, the District submitted a back to work plan to the Massachusetts Department of Elementary and Secondary Education (DESE) as required. This plan called for remote learning for all students until November 2020, followed by a hybrid model from November through February 2021. As part of this plan, the District opened and staffed E-Learning Centers where students were remotely learning in a socially distanced environment in selected school buildings. Originally, the E-Learning Centers were staffed with volunteer paraprofessionals, but in the fall, Canty sent an email to all paraprofessionals informing them that they would be expected to work either in person or remotely but from a school building beginning October 5th.

Between October 1, 2020 and October 4, 2020, Colantuoni and Canty exchanged a series of emails. Colantuoni emailed Canty asking what steps were available for someone who was unable to return to work in-person due to medical or safety concerns. Canty responded that medical documentation would be necessary for a medical leave or that she could take an unpaid leave of absence. Colantuoni, on multiple occasions, requested an accommodation to work from home due to her medical condition. In addition, Colantuoni submitted three separate letters from her nurse practitioner, who was her medical provider. The

letters stated that Colantuoni should not be required to work in any setting that posed a higher risk of COVID-19; that she should not be entering facilities where others are coming and going and contact through shared surfaces and utilities is possible; and that the District was causing Colantuoni to sustain emotional trauma as a result of its decision not to allow Colantuoni to work remotely.

On October 26, 2020, Canty emailed Colantuoni and stated that the only accommodation available for her was to work remotely in an empty classroom that would be cleaned at the end of the day, in a school that would have other District employees present, or alternatively, she could take an unpaid leave of absence.

Between November 2020 and March 2021 there were numerous exchanges between the District and Union Attorney Jennifer Smith (Smith) regarding a reasonable accommodation for Colantuoni. The District repeatedly denied Colantuoni the ability to work completely remotely. During this time, Colantuoni began to exhaust her sick and personal leave. Colantuoni was granted sixty days of sick leave from the sick leave bank so that she would continue to receive compensation during her absence. Additionally, on days that the Madeline English School was forced into remote learning due to COVID-19 issues or weather, Colantuoni logged in and worked remotely consistent with the school's other staff.

On March 9, 2021, DESE determined that effective April 5, 2021, all Districts were required to shift their learning model for elementary school levels to in-person instruction. As a result of this directive, Superintendent Tahiliani contacted the Union to discuss returning to in-person instruction, and precaution protocols for

COVID-19. Colantuoni, as an elementary paraprofessional, was required to return to work in-person on March 29, 2021.

On March 15, 2021, Colantuoni ran out of sick time. In response to a District email, Colantuoni acknowledged that she knew she was out of sick time and requested to reconvene concerning her continued request for an accommodation, as the school that the District had previously offered as an accommodation would now be occupied.

On March 26, 2021, the District directed Colantuoni to return to work in-person at the Madeline English School on March 29, 2021. Colantuoni, who was on unpaid leave, did not report to work as directed.

On April 1, 2021, a meeting was held between Colantuoni, Smith and representatives of the District. The District refused to discuss accommodations unless Colantuoni agreed to return to work in-person on April 5, 2021. The District requested to be notified by April 2, 2021. The following day, April 2, 2021, Colantuoni notified the District that she could not return to work in-person on the advice of her medical provider and a review of the rising COVID-19 case numbers in Everett.

On April 14, 2021, the District sent Colantuoni an email requesting to meet to discuss “next steps regarding your employment.” A meeting was held via Zoom on April 15, 2021. Colantuoni confirmed she would not return to in-person work. Subsequently, on April 29, 2021, the District issued a notice of intent to dismiss for insubordination in refusing to return to in-person work. On May 7, 2021,

Colantuoni requested to meet with Superintendent Tahiliani to review her intention to dismiss.

On June 16, 2021, under MGL c. 71 §42, a meeting was held to review the District's intent to dismiss Colantuoni. Attorney Smith made a presentation on behalf of Colantuoni and Superintendent Tahiliani asked questions of both Smith and Colantuoni. The parties disagreed on what had transpired since October and what exact accommodations were offered to Colantuoni. Both Smith and Colantuoni stated that Colantuoni would be able to return to in-person work at the beginning of the 2021-2022 school year in September of 2021 based on the declining COVID-19 numbers in Everett. Additionally, in response to a question from District counsel Robert Galvin, Smith stated that Colantuoni was prepared to return to work in-person the next day June 17, 2021, which was the second to last school day of the current year. Superintendent Tahiliani only stated that "I understand that obviously with three days left, it's probably - it's hard for the district."

Notwithstanding Colantuoni's offer to return to in-person work on June 17, 2021 and/or September 2021, the District terminated Colantuoni on June 29, 2021.

In her letter, Superintendent Tahiliani stated:

I find that the District's Director of Human Resources, Francesse Canty, explained to you in clear and unequivocal terms and detail the basis for the District's decision to refuse your request to work fully remotely in her letter dated February 24, 2021. I further find that the District's Director offered you the choice of taking a leave of absence in an email dated October 3, 2021 and again on January 6, 2021, ... or in the alternative of working in-person in an Everett school building classroom set up exclusively for your use with all appropriate protocols to protect your health and well-being. ... Since you have

expressly rejected these reasonable accommodations, I now must treat your refusal to return as insubordination.

The Union filed a grievance over Colantuoni's termination that was denied by the District and resulted in the present arbitration.

POSITIONS OF THE PARTIES

THE SCHOOL COMMITTEE

Just Cause

The standard that the School Committee must meet to establish just cause is well known. The School Committee must show: 1) the employee is on notice of a rule or policy, the infraction of which may result in discipline; 2) the employee committed an infraction of the rule or policy; and 3) the amount of discipline issued is in keeping with the seriousness of the offense. Since Colantuoni was clearly and repeatedly warned of the consequences of her refusal to return to work in numerous oral and written communications, both in October 2020 and in March and April 2021 when DESE foreclosed any option to continue with remote learning on a district wide basis, the policy was applied evenhandedly across the district to all paraprofessionals, and the decision to terminate Colantuoni was reasonably related to the duration and purposeful nature of and seriousness of the offense.

E-Learning Centers

In the summer of 2020, as the district was seeking to reopen, the School Committee and the Superintendent were required to submit for approval to DESE a return to school plan by August 14, 2020. Included in this plan was a proposal to establish E-Learning Centers that afforded students and special education

students a measure of in-person learning before a transition to a hybrid model offering in-person and remote learning.

An integral part of this plan that resulted in the School District saving all paraprofessional positions in Everett was to have paraprofessionals staff E-Learning Centers in-person where they would supervise remote learning for students who needed to be supervised in a structured setting of a school building. For those paraprofessionals who were unable, due to individualized health concerns, to supervise students in-person, the plan required them to work remotely by themselves in an empty classroom where they could be supervised and directed by a principal. If any paraprofessional did not wish to work under these terms and conditions, they were given the option of taking an unpaid leave of absence, maintaining their employment, and returning to work when the pandemic eased sufficiently to permit a resumption of in-person learning.

Colantuoni who had been employed in Everett for sixteen years as a teacher's aid and paraprofessional previously had been on medical leave for breast cancer in 2019. Colantuoni wished to not return to in-person learning and requested the ability to work fully remotely on advice of her nurse practitioner. Colantuoni was offered the option of working by herself in an empty classroom supervised by a principal and sanitized daily by a custodian. She was also offered an unpaid leave of absence, thereby preserving her employment when the pandemic subsided. Colantuoni and the Union rejected the accommodations offered indicating that the only acceptable accommodation was working from home.

On March 9, 2021, when DESE ended all local discretion over the District's ability to engage in remote learning, Colantuoni was informed that she had exhausted all sick leave (including leave approved through the sick bank), and was directed to return to in-person learning as of March 29, 2021. There were additional correspondences with the Union, including meetings on April 1, 2021 and April 15, 2021 before the Superintendent informed Colantuoni of her intent to dismiss her for insubordination for her failure to return to in-person learning on April 2, 2021. As of the June 16, 2021 meeting to consider her dismissal, Colantuoni had been on unexcused leave of absence for approximately 91 days and Union counsel indicated that she would not be able to return until September 2021.

Investigation

In this case, the record is clear that the Superintendent, over a period from April 29, 2021 and ending after the June 16, 2021 meeting, fully considered Colantuoni's employment record, her conduct, all the options offered to her to retain her in employment, all the written communications and only after affording her and counsel the opportunity to be heard, rendered a written decision. Notably, the Superintendent concerned herself in particular whether Colantuoni could have elected to take a personal leave, rather than face termination.

Termination Reasonably Related to Seriousness of Offense

In all cases of termination for just cause, the degree of discipline must be related to the seriousness of the offense. In this case we are not dealing with an isolated incident, but rather an extended period of insubordination. Colantuoni's leave became unexcused after March 15, 2021 when she exhausted all sick leave

including additional sick leave granted to her by the sick bank. Colantuoni, despite notice, failed to report for in-person learning. She was also offered an extended leave of absence. Instead, she elected to not report to work in person as directed.

During the period from March 29, 2021 through June 16, 2021, the date of the Superintendent's meeting to review her intent to dismiss, fifty-six school days were missed. Each day that Colantuoni missed, adversely impacted the delivery of services to students, left a classroom teacher without the support of a paraprofessional, and affected the district's ability to return to in-person learning.

THE UNION

The Employer terminated Colantuoni without just cause in violation of the collective bargaining agreement. The Employer alleges that Colantuoni was insubordinate because, relying on the advice of her treating medical provider, she was unable to work in-person supporting students as COVID-19 cases accelerated in Everett, based on her well documented health issues and increased susceptibility to severe illness and death from COVID-19. Upon receiving notice of the Superintendent's intent to terminate, a review meeting was requested. At this meeting in June of 2021, with COVID-19 cases in rapid decline in Everett, Colantuoni offered to return to work immediately, or at the beginning of the next school year if that was more convenient for the Employer. Despite her offer to return, her seventeen years of service, and her unblemished disciplinary record, the Employer terminated Colantuoni without just cause. A review of the facts reveals that the Employer's proffered explanation for its termination was a pretext

for the real motivation to end her employment which was the Employer's frustration with and retaliation for filing Colantuoni's MCAD complaint.

Colantuoni was Never Insubordinate

Colantuoni was successfully working from home, supporting students all of whom were learning remotely at the start of the 2020-21 school year. In October, the Employer suddenly ordered all paraprofessionals back to work in-person, many of whom were expected to work in eLearning centers in addition to performing their regular work as virtual-classroom paraprofessionals. Colantuoni, who is immunocompromised because of her aggressive cancer treatment, was advised by her medical provider not to go to work in-person and requested an accommodation.

Colantuoni, the Union and the Employer went around and around on this issue during which time Colantuoni was forced to exhaust her sick time, including time from the sick leave bank which was donated to her. By letter dated March 26, 2021, Colantuoni was ordered to return to work in-person. Colantuoni, following the advice of her medical provider, who continued to believe it was too dangerous, was unable to return. The Employer took the position that she was refusing to work and that she was insubordinate and noticed her for termination on April 29, 2021. However, Colantuoni was never insubordinate, rather, by not returning to work once she exhausted her leave, she was relying on documented advice from her medical professional that was provided to the Employer to not unreasonably endanger her health and safety.

“Insubordination is the refusal by an employee to work or obey an order given by the employee’s superior.”¹ The order “must be both explicit and clearly given, so that the employee understands both its meaning and its intent as a command.” Additionally, “an employee’s refusal to work or obey must be knowing, willful and deliberate.”² Even if an employee refuses to obey an order, that refusal is not considered insubordination where the order “threatens the employee’s health or safety.”³

The District’s March 26, 2021 letter directed Colantuoni to return to work in-person without any accommodation in light of her medical conditions. The District was well aware of her medical condition, as evidenced by the three notes produced from her medical provider. Moreover, the District’s knowledge of Colantuoni’s cancer diagnosis, need for aggressive treatment, multiple surgeries, and her resultant suppressed immune system is undisputed. Additionally, at the time the District demanded that Colantuoni return to work, the rampant and uncontrolled spread of COVID-19 in Everett posed an even greater risk to her life. To return to in-person work, in a classroom, without any sort of accommodation posed a direct and untenable threat to Colantuoni’s health and safety.

An employee is not obligated to follow an order that threatens the employee’s health or safety. No one reasonably expects a paraprofessional to risk her life and serious illness to come back to work. Under these circumstances, the District has failed to meet its burden to demonstrate that Colantuoni knowingly,

¹ Discipline and Discharge in Arbitration, Norman Brand, page 195.

² Id. At 196.

³ Id. At 204-205.

willfully, and deliberately refused a work order. Rather, the record demonstrates that the District's wishes posed a direct threat to Colantuoni's health and safety. Therefore, her decision not to return to school cannot be deemed insubordination.

Colantuoni Offered to Return to Work

The District's purported reason for terminating Colantuoni was her failure to "report for in-person work as a paraprofessional despite being offered reasonable accommodations by the District." However when the District met with Colantuoni and the Union to review her contemplated dismissal, Colantuoni offered to return to school and work in-person the following day, June 17, 2021. Alternatively, she offered to return in-person at the beginning of the next school year in September, whichever the District preferred. Instead of acknowledging her willingness to return to work in-person, the District took the position that it must treat her refusal to return as insubordination. There was no refusal to return, rather the record shows that once the danger of COVID-19 waned, Colantuoni offered to return to work in-person. Additionally, if Colantuoni's decision to prioritize the advice of her healthcare provider over the District's directive was a "refusal", this "refusal to work" was cured by her offer to return to work immediately at the pre-termination meeting.

Failure of Progressive Discipline

Just cause requires discipline be progressive and imposed at gradually increasing levels, because the object of discipline is to correct, not punish. Progressive discipline, under a just cause framework demands the lowest level intervention for corrective action. Termination is reserved only for the most serious

cases of misconduct. Here, assuming *arguendo* that Colantuoni was insubordinate by prioritizing her medical advisor's advice about what risks were reasonable given her health condition over the District's position that she return to in-person work, termination was an inappropriate response under the progressive discipline framework imposed by just cause. Colantuoni had never been disciplined during her seventeen-year employment history. Termination in the first instance of alleged misconduct, particularly when the alleged misconduct was premised on the belief that the District's directive could result in her death or serious illness is wildly inappropriate. Rather, if the Arbitrator concludes that Colantuoni acted inappropriately, he must also reduce the discipline so it fits within the bargained-for just cause framework.

Conclusion

The District has failed to demonstrate that Colantuoni was insubordinate as alleged. Rather, the evidence presented demonstrates that Colantuoni was following the advice of her medical provider when she did not report to school for work that was too risky to reasonably require the immunocompromised cancer survivor to perform. When the risk to her life and health decreased, she offered to return to work immediately.

As a remedy, Colantuoni must be reinstated to her position as a paraprofessional and be made whole for all lost pay and benefits retroactive to the date of her termination. In addition, the Union requests that the Arbitrator retain jurisdiction over this matter for sixty days after the award is issued to resolve any issues of remedy.

OPINION

The issue before me is: Did the Employer have just cause to terminate Kimberly Colantuoni? If not, what shall the remedy be?

For all the reasons stated below, the Everett School Committee did not have just cause to terminate Kimberly Colantuoni. Colantuoni was a seventeen-year employee of the District with no prior discipline. Additionally, while the employer frames the issues with Colantuoni's work status back to September 2020 when the Superintendent announced the opening of E-Learning Centers, the reality of the situation is that Colantuoni was on approved sick leave until March 15, 2021, and was ordered back to in-person work effective March 29, 2021. Nothing Colantuoni did prior to March 29, 2021, can serve as a basis for just cause to terminate her employment for insubordination.

Between March 29, 2021, and the end of the school year in June, Colantuoni was on an unauthorized unpaid leave for approximately forty-eight school days. Colantuoni, as an immunocompromised breast cancer survivor, relying on the advice of her medical provider, refused to return to in-person work between March 29th and June 16th fearing that the risks to her health were too great. In response to this, the Superintendent sent out a notice of intent to terminate and a review meeting was scheduled between Colantuoni, the Union and the District.

At this meeting, Colantuoni and her representative stated that based on the then current state of COVID-19 infection rate in Everett, Colantuoni would be able to return to in-person work the next day, or in the alternative, the beginning of the next school year in September. The Superintendent acknowledged that with only

two school days remaining in the school year, the next day would be difficult, and made no other statements concerning Colantuoni's offer to return to full time in-person work as previously demanded by the District. Also, during this meeting, the Superintendent acknowledged that the District, on at least two occasions, had offered to place Colantuoni on an unpaid leave and she declined.

The purpose of progressive discipline, in all but the most extreme situations, is to be corrective in nature and not punitive. Even if one is to examine the facts in the light most favorable to the District, Colantuoni's alleged insubordination does not reach the level of an extreme situation that makes termination in the first instance appropriate for a seventeen-year disciplinary free, immunocompromised employee who was following the advice of her medical provider for a period of approximately forty-eight school days. The District offered Colantuoni an unpaid leave of absence twice, and it questioned her during the intent to terminate meeting about why she did not accept those offers. Yet between March 15, 2021 and June 16, 2021, when Colantuoni had exhausted her sick time and had not returned to work, she was effectively on the exact same leave of absence offered by the District. When considered in light of her offer to return to work the next day or the beginning of the next school year, it becomes clear that the District had already decided to end her employment prior to the review meeting and completely ignored her offer to return to in-person work. Those actions, and the ultimate decision to terminate, was punitive in nature and wholly unsupported by just cause.

Based on the facts presented at the hearing, the testimony of the witnesses, and Colantuoni's cumulative work record, the District lacked just cause to

terminate Colantuoni for insubordination. Additionally, based on the District's prior offer to place Colantuoni on an unpaid leave status and Colantuoni's offer to return to in-person work at a time of the District's choosing, I find that the District lacked just cause for any discipline in this matter.

AWARD

The Everett School Committee did not have just cause to terminate Kimberly Colantuoni. The District is hereby ordered to reinstate Kimberly Colantuoni to her position as a paraprofessional, to remove all references to the termination from her personnel file, and make her whole for all losses of pay and benefits sustained back to the first day of the school year in September 2021.⁴



Timothy Hatfield, Esq.
Arbitrator
June 29, 2023

⁴ I shall retain jurisdiction until such time as the parties have reached agreement on the make whole remedy.