

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503  
Boston, MA 02108  
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**FELIX MERCADO,**  
*Appellant*

v.

**WORCESTER PUBLIC  
SCHOOLS,**  
*Respondent*

**Case No.: D1-12-179**

**DECISION**

*Procedural History*

On May 15, 2012, the Appellant, Felix Mercado (Mr. Mercado), was terminated from his position as Bus Driver by the Worcester Public Schools (WPS).

As part of the local hearing process, Mr. Mercado was first sent a notice of hearing informing him of a scheduled disciplinary hearing at which time he may be subject to termination. That notice, marked as Exhibit G, stated in part: "This action is being taken because of your involvement with improper physical contact with a student on a bus which was substantiated by the Department of Children and Families." (*emphasis added*)

The one (1)-page report of the local hearing officer, which was forwarded to the Superintendent of Schools, stated in relevant part that, "Based on the Department of Children and Families 51A/51B substantiating Physical Abuse pertaining to a student while in Mr. Mercado's care, I recommend his immediate termination." (*emphasis added*)

The termination letter itself, signed by the Superintendent, stated in relevant part: "The hearing was to determine if there was cause for your termination due to the findings made by the Department of Children and Families." (*emphasis added*)

On May 22, 2012, Mr. Mercado, pursuant to G.L. c. 31, §§ 41 – 45, filed a timely appeal with the Civil Service Commission (Commission). The Commission held a pre-hearing conference on July 17, 2012.

Pursuant to G.L. c. 31, § 2(b) and G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing. The Magistrate conducted the full hearing on October 25, 2012 at the Durkin Administration Building in Worcester.

On February 27, 2013, both parties submitted post-hearing briefs to the Magistrate.

On June 27, 2013, the Magistrate, pursuant to 801 CMR 1.01 (11) (c), issued a Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. Neither party submitted written objections.

The Magistrate's Tentative Decision, which included findings, analysis and a conclusion, recommended that the Commission uphold Mr. Mercado's termination and dismiss his appeal.

On August 14, 2013, Mr. Mercado, pursuant to 801 CMR 1.01 (7) (k) submitted a Motion to Re-Open the Record, seeking to enter a letter dated August 1, 2013 from the Deputy General Counsel of the Department of Children and Families (DCF) overturning the DCF's decision to support allegations against Mr. Mercado as set forth in the 51B report of March 29, 2012. The WPS submitted a written opposition to the motion.

On September 19, 2013, the Commission, by a 5-0 vote, voted to allow Mr. Mercado's motion to reopen the record for the purpose of entering the August 1, 2013 letter from DCF. Further, the Commission, pursuant to 801 CMR 1.01 (11) (2), voted to recommit the Tentative Decision to the Magistrate to make any additional findings she deemed necessary.

The Magistrate, at her discretion, was free to allow the parties to engage in additional discovery related to the August 1, 2013 letter and hear oral argument or accept written briefs related to this letter.

On September 25, 2013, the Magistrate issued a Notice and Order entering the August 2, 2013 letter as an exhibit and allowing the parties to file written arguments regarding the impact of and the weight that is due this document. Both parties submitted written arguments to the Magistrate on October 25, 2013.

On December 6, 2013, the Magistrate issued a Tentative Decision After Remand. The magistrate added one (1) additional finding to her decision, Finding 32, which stated: "On August 1, 2013, Andrew Todd Rome, Deputy General Counsel for the Department of Children and Families informed Attorney Jun X. Lim that said Department had decided to overturn the support decision in the Mercado matter and indicated that the Department had "unsupported" the allegations."

In the conclusion section of the Tentative Decision After Remand, the Magistrate wrote:

"I stand by my Recommended Decision of June 27, 2013. The regulatory and statutory violations committed by the Appellant that were noted therein are not contingent on the finding of the Department of Children and Families and stand on their own merit. The decision on the 51B report was only one item considered by the Superintendent of Schools when she rendered her decision.

There is no requirement that the conduct that is the subject of the disciplinary action be sufficient to warrant "abuse" within the meaning of G.L. c. 119, § 51A in order to establish just cause under the Civil Service Statute, G.L. c. 31."

### *Additional Finding*

To ensure clarity, we make the following additional finding, Finding 33:

- After review of the evidence and testimony provided at a Fair Hearing, the Department of Children and Families decided to overturn the support decision regarding the Appellant. The Department “unsupported” the allegations.

While the Magistrate made an additional finding that a *letter was sent* informing the parties of this action, neither party has disputed that DCF did indeed overturn the initial decision and “unsupported” the allegations against Mr. Mercado.

### *Analysis*

We concur with the Magistrate’s conclusion that an Appointing Authority is not required to show that an employee’s actions constituted “abuse” as defined by state law in order to terminate an employee for the type of misconduct alleged here.

Appointing Authorities must show, however, *by a preponderance of the evidence*, that said misconduct occurred. Here, a full review of the record shows that the Worcester School Department relied heavily on the findings of a DCF investigator that abuse occurred to justify the termination of Mr. Mercado.

As referenced above, the notice of hearing to Mr. Mercado explicitly stated that the local hearing related to the initial DCF findings. The only reference to evidence outside of the initial DCF report considered by the hearing officer was “conflicting reports as to Mr. Mercado’s behavior.” The last paragraph of the hearing officer’s report is unambiguous in regard to the evidence relied upon to justify Mr. Mercado’s termination stating, “Based on the Department of Children and Families 51A/51B substantiating Physical Abuse pertaining to a student while in Mr. Mercado’s care, I recommend his immediate termination.”

The termination letter from the Superintendent was equally clear in regard to the evidence relied upon, explicitly stating that the purpose of the local hearing was to determine whether there was cause for Mr. Mercado’s termination “due to the findings made by the Department of Children and Families.”

It is now undisputed that the initial DCF decision, upon which the local hearing officer and the Superintendent relied, was *overturned* by DCF and the allegations against Mr. Mercado were deemed “*unsupported*” by DCF. In short, the primary evidence used by the School Department to justify Mr. Mercado’s termination no longer stands.

The School Department, concurring with what would eventually be the Magistrate’s recommendation after remand here, argues that the initial DCF findings were only one part of the Superintendent’s determination that misconduct occurred and that termination was warranted. Finding 29 states that the Superintendent considered the following three (3) factors when making her decision to terminate Mr. Mercado:

1. The initial DCF decision;

2. The report of the hearing officer [which was based on the initial DCF decision]; and
3. The incident reports of the Appellant's co-workers.

It is noteworthy that the Superintendent apparently did not review or consider the police incident report that was completed on the day of the incident<sup>1</sup> which has been marked as Exhibit A.

Worcester Police Officer John Collamore's report, in its entirety, states as follows:

"On 03/07/12 I was dispatched to Hadwen rd and Chandler st for a disorderly student on a school bus that had been forced to pull over and stop because of the students actions. Upon arrival with Officer Bob Hazelhurst I encountered the bus driver Felix Mercado and the student []. [Student] was cursing at Felix saying fuck you you spick over and over again. At this time Felix let go of [student] and backed off the bus. I now asked [student] what the problem was and he responde (sic) fuck you. At this time [student] was taken off the bus. I now asked what the problem was and he responde (sic) fuck you. At this time [student] was taken off the bus to await the arrival of his mother [], who was notified by dispatch to respond to our location. Mr. Mercado explained that he picked the child up (sic) Chandler jr High the Act Program. This program is for children with behavior issues. Today on the bus [student] would not sit in his seat he (sic) continued to jump from seat to seat and at some point opened a window and tried to climb out and jump from the bus. Mr. Mercado plced (sic) his hands on the child to restrain him from hurting himself or anyone else while he waited for police to respond. Mercado is trained through the Worcester public schools transportation Dept in dealing with potentially violent children and how to restrain them.

Nelson Quinones another bus driver had pulled over to assist Mercado in dealing with [student]. Nelson started to video the incident using his cell phone. I viewed the video and it captured Mercado holding the childs hands together and speaking to him in a calm voice trying to calm the child down. [Student] continued to struggle and curse at all of us on the scene.

Once [student] was off the bus he sat on some steps and waited for his mother [] to respond. At no time did [] complain of being injured or cry or seem upset. [] showed up and tried to speak with her son to which he responded shutup lets get the fuck out of here now. [] stated her son has some behavioral issues and I explained the incident today. [] thanked me and left. On 3/11/12 [] contacted me and stated her son told her he was assaulted by the bus driver Felix Mercado and had contacted the school about the incident. I advised her I would investigate it further and get back to her. I spoke to Tom Flynn an administrator at Worcester Public Transportation 60 Freemont st [phone number]. Mr. Flynn stated he was aware of the incident and Felix Mercado was placed on paid leave pending the investigation. Flynn stated felix has been with the company since December of 1996 and they have never had an issue with the man. Flynn also stated that they had numerous documented incidents with [] while he has been a passenger on the bus service they provide. A copy of this report will be forwarded to the school liaison officer Mike Luong for further investigation in regards to this incident."

There are two (2) incident reports from co-workers that the Superintendent apparently did consider before making her decision.

The first incident report from a co-worker states, in its entirety:

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<sup>1</sup> As part of the pre-hearing conference, the School Department represented that the School Department, as of the date of the pre-hearing, had never even seen the police incident report.

"About 2:45 pm Felix Mercado called over the radio for another bus to help out. He was having trouble w/ a student []. When Nelson and I got to Temple Emmanuel where Felix was, I got onto his bus. He was holding down []. [] was out of control, screaming obscenities, kicking, trying to get his hands free. [] was in the front seat and Felix was just standing over him just holding his hands down, he wasn't calming down at all. That's when Nelson called into base for the police to come. After [] heard that the police were coming he calmed down some (sic) asked felix to bring him back to the school Felix told him that all the teachers left. We tried to make a switch and get [] onto my bus we got part way, and he didn't want to go. So he got back on Felix's bus and we waited with Felix for the police to come. When the Police came they took Nathaniel off the bus and waited with him till his mother came. They sent us on our way."

The second incident report from a co-worker states, in its entirety:

"On Wednesday 3-7-2012 I went to help Felix Mercado and when I got to his bus I suggested to call the Police because I saw a kid out of control and Felix was trying to calm him down to put the kid in my bus but the kid didn't want to go in my bus so we waited for the police and the police took him until parents came down to pick him up."

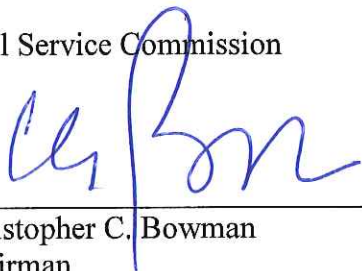
The first factor considered by the Superintendent, the initial DCF decision, was overturned by DCF. The second factor considered, the hearing officer's report, relied almost exclusively on the same initial DCF decision that was overturned. The third factor considered, the co-worker reports reference above, does not support a conclusion that Mr. Mercado abused a student.

Based on our review of the findings and the entirety of the record here, the Worcester School Department has not sustained its burden of proving by a fair preponderance of the evidence that Mr. Mercado engaged in abuse or improper physical contact with a student, the stated reasons for his termination.

### *Conclusion*

For all of the above reasons, we do not adopt the recommendation of the Magistrate. The decision to terminate Mr. Mercado is overturned, his appeal is *allowed*, and he shall be restored to his position, forthwith, without any loss of pay or benefits.

Civil Service Commission

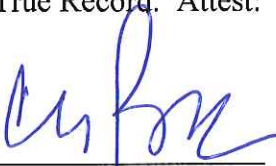


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Christopher C. Bowman  
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein) on February 6, 2014.

A True Record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice to:

Ryan Dunn, Esq. (for Appellant)

Sean Sweeney, Esq. (for Respondent)

Richard Heidlage, Esq. (Chief Administrative Magistrate, DALA)

THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

**Felix Mercado,**  
Appellant

v.

Docket No. D1-12-179

DALA No. CS-12-631

DATED: June 27, 2013

**Worcester Public Schools,**  
Appointing Authority

**Appearance for Appellant:**

Ryan Dunn, Esquire  
Massachusetts Teachers' Association  
20 Ashburton Place  
Boston, MA 02108

**Appearance for Appointing Authority:**

Sean P. Sweeney, Esquire  
311 Village Green North, Suite A4  
Plymouth, MA 02360

**Administrative Magistrate:**

Judithann Burke

**CASE SUMMARY**

The Appointing Authority, Worcester Public Schools, proved that there was just cause to terminate the employment of the Appellant, a Bus Driver. A preponderance of the evidence reflects that the Appellant used physical force to subdue and restrain a child who was changing seats and acting up on a school bus on March 7, 2012. His actions were not only in contravention with the policies of the Worcester Public Schools but also violated the provisions G.L. c. 71 § 37G (a)-(c) and 603 CMR 46.01 (3)(a) and (b).

**RECOMMENDED DECISION**

Pursuant to G. L. c. 31, §§ 41-45, the Appellant, Felix Mercado, is appealing from the May 15, 2012 action of the Appointing Authority, Worcester Public Schools,

discharging him from his position as bus driver. (Exhibit 2.) The appeal was timely filed. A Section 43 hearing was commenced on October 25, 2012 at the Durkin Administration Building, 20 Irving Street, Worcester, MA. The hearing was continued to November 15, 2012 and was heard to completion.

At the hearing, twenty-nine (29) exhibits were marked Exhibits A-Cc. The Appointing Authority presented the testimony of the following witnesses: Coleen Culligan, Administrator of the Academic Center for Transition (ACT Program) at the Chandler Magnet School in Worcester, MA; Mark T. Brophy, Director of Instructional Support Personnel in the Worcester Public Schools; Melinda Jones Boone, Ph.D., Superintendent of the Worcester Public Schools; John Hennessey, Director of Transportation for the Worcester Public Schools; and Mrs. F, mother of the twelve (12)-year old male student involved in an incident with the Appellant on March 7, 2013.

The Appellant testified in his own behalf. The Appellant also presented the testimony of fellow bus driver Nelson Quinones. The hearing was digitally recorded.

The record was left open for the filing by the parties of post-hearing memoranda of law and proposed findings of fact. The last of these was received on March 14, 2013, thereby closing the record.

### **FINDINGS OF FACT**

Based upon the testimony and documents submitted at the hearing in the above-entitled matter, I hereby render the following findings of fact:

1. The Appellant, Felix Mercado, 49 y.o.a., began employment as a Bus Driver for the Worcester Public Schools on December 2, 1996. (Mercado Testimony.)

2. The Appellant was born in Puerto Rico and moved to the United States in or about 1972. (*Id.*)
3. The Appellant's prior discipline includes a written warning dated March 2001. (Exhibit Q.)
4. The Worcester Public School system owns and operates approximately forty (40) small school buses. These buses are used for thirty-two (32) school bus routes for door to door transportation of those students whose Individual Education Plans include transportation as part of related services. There is also bus transportation for some homeless students. (Hennessy Testimony.)
5. On February 20, 2007, the Appellant participated in training on the subject of Disruptive Student Behavior, as evidenced by the sign-in sheet for that session. (Exhibit V.)
6. On August 31, 2009 the Appellant participated in CPI (Crisis Prevention Institute) Training that included two components: verbal de-escalation and appropriate physical restraint. (Exhibit W.)
7. On August 24, 2010, the Appellant participated in training on the subject of "CPI Refresher." (Exhibit X.)
8. The Appellant participated in numerous other professional training sessions, including on August 20, 2010 and August 30, 2011, where the various Superintendent's Bulletins were reviewed and discussed. These included bulletins relating to "WPS Policy and Procedures for Reporting Child Abuse and Neglect", "Addressing Disruptive Students", "Guidelines for Appropriate Professional Behavior", "Safety and Behavior

Rules for Pupils Riding School Busses” , and “Code of Conduct”. (Exhibits J-M, and O-P and Brophy Testimony.)

9. Mark Brophy conducted training of the bus drivers and monitors on the reporting day before the school years started in 2010, 1011 and 2012. (Brophy Testimony.)

10. There is annual training of all bus drivers on the subject of the Superintendent’s Bulletins and the expectation that serving as a driver would include professional behavior. (Boone Testimony.)

11. The duty of care or standard of care was described by Mr. Brophy as what a reasonable person should be doing when with children, i.e., the attentiveness, the care, the applying of one’s wherewithal not to hurt children and to make sure that children are safe. (Brophy Testimony.)

12. The obligation of the driver to enforce conduct rules on busses does not include the use of force to bring about compliance with the rules. (Boone and Brophy Testimony.)

13. In reviewing Bulletin No. 1, Mr. Brophy instructed the participants in training that school bus drivers could be reported if they engaged in any physical abuse or neglect. (*Id.*)

14. The Appellant also participated in a Nonviolent Crisis Intervention Training Program in October 2009 and the Worcester Public Schools submitted copies of these materials into evidence. (*Id.*, Appellant Testimony and Exhibits Bb and Cc.)

15. Among the trainings received by the Appellant was the directive not to engage in power struggles and to respect the personal space of others. (Brophy and Appellant Testimony.)

16. Per the policies and directives of the Worcester Public Schools, and consistent with all of the Appellant's trainings, there are very limited circumstances under which physical restraint of a child is appropriate. These include situations where the individual restraining the child is threatened with imminent physical assault by an unruly child; the unruly child presents a danger to him or herself, and/or, the unruly child presents a danger to others. (Mercado Testimony, G.L. c. 71 § 37G (c) and 603 CMR 46.01(3).)

17. Twelve (12) year old male student NF suffers from attention deficit hyperactivity disorder, oppositional defiant disorder and post-traumatic stress disorder. (Mrs. F. Testimony.)

18. On March 7, 2012, NF was enrolled in the ACT Program at the Chandler Magnet School due to behavioral issues. (Mrs. F. Testimony.)

19. There was no bus monitor on the Appellant's bus on March 7, 2012. (Appellant and Hennessey Testimony.)

20. NF boarded the Appellant's bus, no. 944, at approximately 2:40 PM on March 7, 2012. A few moments after driving away from the Chandler Magnet School, the Appellant looked in his rear view mirror. He noticed that NF was not in his assigned seat immediately behind the driver. NF had been instructed to sit in the front of the bus because he had caused problems in the back of the bus on prior bus runs. He had also attempted to jump out of a bus window on at least one prior occasion.

The Appellant stopped the bus in front of the Temple Emanuel on Chandler Street and located NF, who, he discovered crouched between two seats further down the aisle away from the front. The Appellant told him to move back to the front of the bus. NF began swearing, yelling and flailing his arms and legs. The Appellant told him to move back to the front of the bus or he would help him move.

When NF failed to comply, the Appellant physically moved NF back down the aisle toward the front seat by holding his arms behind his back and propelling him forward. NF began struggling and screaming. At one point, NF tripped on his backpack or sweater and fell in the aisle of the bus. When he got up, the Appellant continued to hold his arms behind him and forced him into the front seat behind the driver's seat. NF began to struggle again. He was not fitted properly in a car seat that was attached. The Appellant held him face down with his head on the back of the front seat and continued to hold his arms behind his back. NF continued to twist, scream and attempt to free himself of the hold.

The driver requested that another student, Angel, who was sitting in the back of the bus, go to the front and get the radio. The Appellant radioed another driver for assistance. The Appellant continued to physically manage NF by holding him down against the front seat with his arms behind his back. (Exhibit B.)

21. After a few minutes, a second school bus pulled up. The driver, Nelson Quinones, entered the Appellant's bus and began to record the incident on his cellular phone. The police had also been summonsed. At that time, NF began to calm down. The Appellant loosened his grip on NF. (*Id.*)

22. When the police arrived, NF was taken off the bus in handcuffs. He continued to swear and mock the Appellant and the police. The police waited with NF until his mother arrived at the scene. NF had calmed down prior to the arrival of his mother, and was released into her custody. (Mrs. F. and Quinones Testimony.)

23. At home that evening, NF's mother noticed that NF had bruises and a scratch on his left shoulder and wrist areas. He was seen at Harding Pediatrics the next day. (Mrs. F. Testimony and Exhibits B, Y and Z.)

24. On March 11, 2012, NF's mother called ACT Administrator and indicated that she planned to file assault charges against the Appellant. Colleen Culligan commenced an investigation and filed a 51A report with the Department of Children and Families (DCF) in accordance with G.L. c. 119. (Mrs. F. Testimony, Culligan Testimony and Exhibits R and S).

25. During the investigation, the Appellant informed the responding police officer and the DCF investigator that on March 7, 2012 NF would not sit in his assigned seat, jumped from seat to seat and that he tried to jump out of a bus window during the disturbance. (Appellant Testimony and Exhibits A and B.)

26. The Appellant was placed on administrative leave on March 11, 2012 prior to the DCF investigation. (Exhibit B.)

27. The DCF investigator spoke with witnesses of the events of March 7, 2012, including NF and his mother, the Appellant, and two students who were on the bus. (Exhibits A and B.)

28. The DCF 51B report of March 29, 2012 contained the following comments and conclusions:

While it is concluded that N was unwilling to comply with the directions of Mr. Mercado and engaged in unsafely moving about the bus, Mr. Mercado did attempt to physically manage the child causing bruising on the child. Witnesses on the bus all confirm that Mr. Mercado was physically holding the child in an attempt to restrain the child. Mr. Mercado further confirmed and verified that he was holding the child's wrists placing the child at risk for physical injury. This investigator notes that while there was no monitor on the bus, Mr. Mercado did attempt to verbally de-escalate the child however then proceeded to use physical means to control the child. Mr. Mercado had already pulled the bus over to ensure the safety of the other children on the bus and had contacted the police as well as a separate bus. It is unclear why Mr. Mercado continued to utilize physical restraint on the child while waiting for assistance. Witnesses and Mr. Mercado related that the child had periods of calmness and did not need to be restrained or have any hands on him. Mr. Mercado did not wait for assistance before becoming physical with the child. It is reasonable that some of the reported injuries were caused by the struggle between Mr. Mercado and the child; however, the child did sustain some bruising as a result of Mr. Mercado's holding the child's wrists. In speaking with staff at the bus company, there is a "hands off" policy relative to children on the bus. Furthermore, the bus company has only trained staff in safely de-escalating children with verbal direction, the staff has not been trained in the safe physical management of children even if this were permissible by policy.

(Exhibit C.)

29. Dr. Boone weighed the DCF 51B reports, the report of Hearing Officer Mark Brophy and the Incident Reports of the Appellant's co-workers in making her decision. She concluded that under the circumstances described in the Appellant's incident report, the Appellant could have allowed the student to continue to sit in the unassigned seat so long as no problems were created and safe transport could occur. She believed that another viable option would have been to let NF stay in the unassigned seat while the bus was stopped and wait until the police and/or other assistance arrived because none of the

witness reports reflected that NF was a threat to himself or others during the incident.

(Boone Testimony.)

30. On Dr. Boone notified the Appellant that she had reviewed the report of hearing Officer Mark Brophy and adopted the findings and conclusions therein. She dismissed the Appellant effective May 15, 2012. (Exhibits H and I.)

31. The Appellant filed a timely appeal.

### CONCLUSION AND RECOMMENDED DECISION

After a careful review of all of the testimony and exhibits in this case, I have concluded that the Appointing Authority had just cause to terminate the Appellant from his position as Bus Driver for the Worcester Public Schools. The Appointing Authority has proven by a preponderance of the evidence that the Appellant engaged in the physical restraint of a student on the day in question contrary to school policies and directives and resulting in physical injury to the child. See *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997); *Town of Watertown v. Arria*, 16 Mass. App. Ct. 331 (1983) and *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003).

G.L. c. 71 §§ 37G (a)-(c) provide, in pertinent part:

(a) The power of the school committee or any teachers or any other employee or agent of the school committee to maintain discipline upon school property shall not include the right to inflict corporal punishment upon any pupil.

(b) The provisions of this section shall not preclude any member of the school committee or any teacher or employee or agent of the school committee from using such reasonable force as necessary **to protect pupils, other persons, and themselves from assault by a pupil.**

(c) The board of education shall promulgate regulations regarding the use of physical restraint for students. Such regulations shall not preclude any teacher or employee or agent of the school from using reasonable force to **protect pupils, other persons and themselves from an assault by a pupil as set forth above in section (b).**

(Emphasis added.)

603 CMR 46.00 of the Education Laws and Regulations pertains to “physical restraint.” Section 46.01(3) provides, in pertinent part:

(3) Purpose. The purpose of 603 CMR 46.00 is to ensure that every student participating in a Massachusetts public education program is free from the unreasonable use of physical restraint. Physical restraint shall be used only in emergency situations, after other less intrusive alternatives have failed or been deemed inappropriate, and with extreme caution. School personnel shall use physical restraint with two goals in mind:

(a) To administer a physical restraint only when needed to protect a student and/or member of the school committee from **imminent, serious physical harm**; and

(b) To prevent or minimize any harm to the student as a result of the physical restraint.

(Emphasis added.)

The facts in this case do not demonstrate any emergency situation where the Appellant, other students on the bus or NF himself was at risk of imminent physical harm notwithstanding the description of events put forth by the Appellant. It is clear from the myriad witness statements in the 51B report and the incident reports from the Appellant’s co-workers that while NF behaved in a highly inappropriate manner on March 7, 2012 both by leaving his assigned seat and by failing to cooperate with the Appellant through verbal insults and physical gestures, the decision of the Appellant to engage in a power struggle with NF and to become physical with him escalated the problem. The incident caused concern and alarm in the other students and resulted in physical injuries to NF.

The chaos on bus no. 944 during the afternoon of March 7, 2012 could have been more quickly de-escalated and resolved had the Appellant simply waited for the arrival of the police and/or the second bus.

The approach endorsed by the Appointing Authority would have been far more reasonable and effective in this case, especially since NF was not acting in a manner that placed himself or any other students in imminent danger. He was crouched on the floor between two seats and was isolated from others when the altercation began. Once he left that area, he was immediately under the physical control of the Appellant.

I do not find the Appellant's claim that NF tried to climb out of a bus window on March 7, 2012 to be credible. The Appellant restrained NF for nearly the entire time after he had stopped the bus. The evidence does not reflect that he was wildly running from seat to seat throughout the bus as the Appellant suggests. Lastly, the Appellant continued to physically restrain and taunt the child even after the child had de-escalated his own behavior.

The Appellant has proffered a self-serving version of the events that afternoon in which NF's actions are exaggerated so as to come within the "emergency" and "imminent danger" parameters of the applicable law, policies and regulations in order to legally justify his actions. I do not believe that NF attempted to jump out of a window on that occasion. Further, as previously noted, I do not believe that the Appellant or any of the other students were in imminent physical danger.

Further, the resultant physical injuries to NF fall within the parameters of the definition of "neglect" as defined in G.L. c. 119 and 110 CMR, both pertaining to the

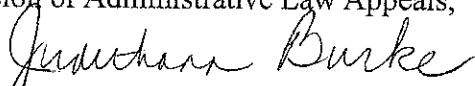
Department of Children and Families. "Neglect" is defined in 110 CMR 2.00, the Glossary, as "failure by a caretaker, either deliberately or through negligence or inability, to take those actions necessary to provide a child with...supervision,,,or other essential care". The DCF investigation concluded that the Appellant unnecessarily restrained the child and that his actions resulted in physical injury to the child. He did not provide the appropriate care and supervision under the circumstances. The decision of the Appointing Authority to termination the Appellant's employment is supported by this conclusion.

The Appellant had received a written warning back in 2001. Taking this into account along with the poor judgment he demonstrated on March 7, 2012, the conclusion reached by the Appointing Authority that he cannot effectively carry out the duties of a bus driver for the Worcester Public Schools is reasonable. The Appointing Authority's decision to terminate his employment was appropriate, and neither arbitrary nor capricious.

The decision of the Appointing Authority in this case was based upon adequate reasons sufficiently supported by credible evidence. Common sense and the correct rules of law render it "justified." See *Selectmen of Wakefield v. Judge of First Dist. Ct. of Middlesex*, 262 Mass. 477, 482 (1928). I recommend that the Civil Service Commission affirm the decision of the Worcester Public Schools.

Division of Administrative Law Appeals,

BY:



Judithann Burke, Administrative Magistrate

DATED: June 27, 2013

THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

**Felix Mercado,**  
Appellant

v.

Docket No. D1-12-179  
DALA No. CS-12-631  
DATED: December 6, 2013

**Worcester Public Schools,**  
Appointing Authority

**Appearance for Appellant:**

Ryan Dunn, Esquire  
Massachusetts Teachers' Association  
20 Ashburton Place  
Boston, MA 02108

**Appearance for Appointing Authority:**

Sean P. Sweeney, Esquire  
311 Village Green North, Suite A4  
Plymouth, MA 02360

**Administrative Magistrate:**

Judithann Burke

**CASE SUMMARY**

The Appointing Authority, Worcester Public Schools, proved that there was just cause to terminate the employment of the Appellant, a Bus Driver. A preponderance of the evidence reflects that the Appellant used physical force to subdue and restrain a child who was changing seats and acting up on a school bus on March 7, 2012. His actions were not only in contravention with the policies of the Worcester Public Schools but also violated the provisions G.L. c. 71 § 37G (a)-(c) and 603 CMR 46.01 (3)(a) and (b). This is so notwithstanding the subsequent finding of the Department of Children and Families overturning its earlier decision and concluding that the allegations set forth in a March 29, 2012 51B report were unsupported.

### **TENTATIVE DECISION AFTER REMAND**

Pursuant to G. L. c. 31, §§ 41-45, the Appellant, Felix Mercado, had appealed from the May 15, 2012 action of the Appointing Authority, Worcester Public Schools, discharging him from his position as bus driver. (Exhibit 2.) The appeal was timely filed. A Section 43 hearing was commenced on October 25, 2012 at the Durkin Administration Building, 20 Irving Street, Worcester, MA. The hearing was continued to November 15, 2012 and was heard to completion.

On June 27, 2013, I issued a Recommended Decision to the Civil Service Commission wherein I concluded that the Appointing Authority had been justified in terminating the Petitioner's employment. *Felix Mercado v. Worcester Public Schools*, D1-12-179, CS-12-631 (Division of Administrative Law appeals June 27, 2013.)

On August 14, 2013, the Appellant filed a Motion to Reopen the Record for the Limited Purpose of Admitting a Document into Evidence. On September 19, 2013, the Civil Service Commission voted to allow the Appellant's motion to reopen the record for the purpose of entering an August 1, 2013 letter from the Department of Children and Families into the record. The document has been marked "Exhibit 30."

The record was left open for the optional filing by the parties of follow-up post-hearing memoranda of law based upon the new exhibit. The last of their submissions was received on October 28, 2013, thereby reclosing the record.

### **FINDING OF FACT**

Based upon the admission of Exhibit 30 into the case record, I hereby render the following additional finding of fact:

32. On August 1, 2013, Andrew Todd Rome, Deputy General Counsel for the Department of Children and Families informed Attorney Jun X. Lim that said Department had decided to overturn the support decision in the Mercado matter and indicated that the Department had “unsupported” the allegations. (Exhibit 30.)

### **CONCLUSION**

I stand by my Recommended Decision of June 27, 2013. The regulatory and statutory violations committed by the Appellant that were noted therein are not contingent on the finding of the Department of Children and Families and stand on their own merit. The decision on the 51B report was only one item considered by the Superintendent of Schools when she rendered her decision.

There is no requirement that the conduct that is the subject of the disciplinary action be sufficient to warrant “abuse” within the meaning of G.L. c. 119, § 51A in order to establish just cause under the Civil Service statute, G.L. c. 31.

Division of Administrative Law Appeals,  
BY:

Judithann Burke  
Administrative Magistrate

DATED: December 6, 2013