

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

.....

Providence School Board

v.

Ana Farias

.....

DECISION

Held: There is good and just cause for Ms. Farias' termination from her position as a tenured teacher. Proof submitted by the Providence School Board demonstrates, by a preponderance of the evidence, that Ms. Farias pushed a student after being warned verbally and in writing that any unacceptable physical conduct with students would be grounds for her termination. In light of her disciplinary history, this misconduct constitutes good and just cause for termination under R.I.G.L. 16-13-3.

DATE: November 22, 2006

Travel of the Case

On December 7, 2004 counsel for Ana Farias, a tenured teacher in Providence, appealed from the November 29, 2004 decision of the Providence School Board terminating her from her position at the Mary E. Fogarty School. The undersigned was designated by Commissioner Peter McWalters to hear and decide this appeal. A series of hearings was held on dates selected by agreement of the parties: May 5, June 2, July 13, September 9, September 30, and November 15, 2005. The brief on behalf of Ana Farias was submitted on March 1, 2006 and the brief of the School Board was submitted on March 17, 2006. Thereafter, on March 30, 2006 counsel for the School Board submitted a letter in the nature of a reply brief. Counsel for Ms. Farias was given the opportunity to submit additional written arguments on her behalf. The record in this matter closed on May 19, 2006.

ISSUES:

Is the Providence School Board's dismissal of Ana Farias supported by "good and just cause" as required by R.I.G.L. 16-13-3?

Was there a letter of reprimand which documented Ms. Farias' disciplinary history for prior unacceptable physical conduct with students?

Findings of Relevant Facts:

- Ana Farias began work as an ESL teacher in the Providence School Department in September of 2000. During the period 2002-2004 she was assigned to a first grade, ESL classroom at the Mary E. Fogarty School. Tr. Vol.III, p. 423.
- On December 20, 2002 the principal of the Fogarty School, Susan Chin, received a verbal complaint from the mother of one of Ms. Farias' students. Her complaint was that Ms. Farias had grabbed her son by the back of his closed coat, pulled on the coat to the point where it caused pressure against his neck, choking him. PSB Ex.7.
- On January 8, 2003 Ms. Chin received another complaint from a parent of one of Ms. Farias' students. The written complaint alleged that Ms. Farias had, on several occasions, twisted his daughter's wrist, with the result that she was afraid to come to school. PSB Ex. 7.
- Ms. Chin investigated these two incidents, including having each of the children involved demonstrate to her what had happened. Tr. Vol. I, pp. 131-133; Vol. II, pp. 277-280.

- Ms. Chin spoke to Ms. Farias about these two incidents on January 8, 2003. Ms. Farias did not deny that they had occurred, but sought to explain her conduct by saying that the children didn't listen to her, that they were chatty or unruly. Tr. Vol.I, p 136; Vol.II, pp. 272, 281; Vol.V, pp. 25-27.
- At the January 8, 2003 meeting, Ms. Chin gave Ms. Farias a verbal reprimand and warned Ms. Farias not to "put her hands on the children" and Ms. Farias agreed that she would be careful not to handle students in such manner in the future. PSB Ex. 7; Tr.Vol. I, pp. 135-136 and 167.
- On January 16, 2003 Ms. Chin received another complaint from a parent of student in Ms. Farias' class. The complaint, which was written in Spanish and translated into English, was that Ms. Farias had yelled at her son and grabbed him by the back of the shirt and then "picked him up". This was alleged to have occurred on several occasions. PSB Ex. 7 and 12.
- After speaking with the parent and the child involved in this third complaint, Ms. Chin spoke to Ms. Farias on January 23, 2003. Initially, Ms. Farias admitted the incident had occurred and again sought to explain that the children didn't listen to her, did not line up properly when directed to, etc. Tr. Vol. I, pp. 137-138; When Ms. Chin advised her that the incident would be documented and information forwarded to the Human Resource Department, Ms. Farias then denied all three incidents and insisted that she have union representation present. Tr. Vol. I, pp. 138-139; Vol. V, p.36.
- After the meeting on January 23, 2003 Ms. Farias requested a copy of the narrative Ms. Chin had prepared describing the three incidents for the Human Resources Department, and the attached written complaints from the parents in two of the three incidents. Ms. Chin provided her with copies of these documents. PSB Ex. 12 and 14; Tr. Vol.V, pp.34-36.
- Ms. Chin prepared a written reprimand for placement in Ms. Farias' personnel file, and attached to it the narrative of the three incidents on which it was based. She presented both documents to Ms. Farias for her signature some time in mid-March of 2003. Ms. Farias did not sign the reprimand at that time, but took a copy for further review. She ultimately signed the written reprimand on April 2, 2003. PSB Ex. 7; Tr. Vol. I, pp.125- 130.
- The reprimand cited the attached chronology of the three parent complaints and noted that Ms. Chin had discussed each of these incidents with Ms. Farias. In the letter Ms. Chin warned Ms. Farias that further inappropriate workplace behavior, including future incidents of inappropriate physical contact with students, would result in additional disciplinary action, including possible termination of her employment. PSB Ex. 7.
- Ms. Farias added a note below her signature that she preferred not to sign the letter, but was doing so to avoid being considered insubordinate. PSB Ex. 7.

- The letter of reprimand notes that “a copy of this letter will be placed in your Personnel File”. PSB Ex. 7. Ms. Chin forwarded a copy of the letter to Human Resources for placement in Ms. Farias’ personnel file. Tr. Vol. I pp. 140, 165.
- Ms. Farias testified that on two subsequent occasions when she checked her personnel file, June 19, 2003 and March 9, 2004, Ms. Chin’s letter of reprimand was not there. Tr. Vol. III p. 478, 487 and 488.
- On March 12, 2004 at about one o’clock (1 p.m.) Ms. Farias pushed one of the girls in her first grade class as she stood in line outside the girls’ bathroom, surrounded by other students. Just prior to pushing the student, Ms. Farias yelled “I’m sick of you”. Tr. Vol.I pp. 46-47; Vol.II pp. 405-408.¹
- A teacher who had seen Ms. Farias push the student reported it immediately to the principal. Tr. Vol. I p. 52. A teacher assistant who had also seen Ms. Farias push this student reported it to the principal several minutes later. Tr. Vol. II p.408. The principal went to Ms. Farias’ classroom to take the child to be checked by the school nurse. She told Ms. Farias of the allegation made against her and requested that Ms. Farias come down to her office at dismissal time. Ms. Farias and her union representative met in Ms. Chin’s office at the end of the school day. When presented with the allegation she had pushed a student, whom Ms. Chin identified by name, Ms. Farias had no comment and left Ms. Chin’s office.² Tr. Vol.I pp. 162-163.
- The child pushed by Ms. Farias had no physical injuries. On her parents’ request, she was transferred to another first grade classroom at her school. Tr. Vol.I pp.156-159.
- Ms. Chin forwarded a report of the incident, together with witness statements and the school nurse’s note, to the Director of Human Resources, Donald Zimmerman on March 12, 2004. Mr. Zimmerman met with the parents and the student that same afternoon. PSB Ex.6. Vol.II pp.310-316.
- After receiving Ms. Chin’s report, Mr. Zimmerman reviewed Ms. Farias personnel file. He was surprised that the written reprimand he had discussed with Ms. Chin during the prior school year was not in the file, so he called Ms. Chin who sent him another copy of the letter. Mr. Zimmerman placed this copy in Ms. Farias’ personnel file. Tr. Vol.II pp. 317-329.
- Mr. Zimmerman then met with Ms. Farias, her union representative and counsel, as well as Ms. Chin, on the following Tuesday, March 16, 2004. Tr. Vol. I p.210; Vol.II p.316. Mr. Zimmerman raised the March 12, 2004 incident as well as the prior

¹ One witness to this incident, a teacher assistant, did not hear Ms. Farias say anything at the time she pushed this student. However, when the child was interviewed on the day of the incident, she stated she was also “shouted at”. Tr. Vol. II, p.312.

² Ms. Farias testified that when Ms. Chin came to the door of her classroom on the afternoon of March 12th, and informed her of the allegation she had pushed a student, whom she identified by name, she stated: “just do whatever you have to do. If this is an issue that might involve discipline, I have a right to have my union representative present, and please don’t disrupt my class anymore”. Tr. Vol. III pp.504-505.

incidents which were summarized in the written reprimand he had placed in her file prior to the meeting. Tr. Vol.II p.325.

- Upon completing his investigation, Mr. Zimmerman presented the entire matter to the Superintendent of Providence schools, Dr. Melody Johnson. They reviewed not only the information on the March 12, 2004 incident, but the information contained in the prior written reprimand that had been placed in her personnel file. On March 25, 2004 Ms. Farias was notified that Dr. Johnson would recommend to the School Board that she be terminated. PSB Ex.8; Tr. Vol. II. pp. 324-327.
- Written notice sent by Dr Johnson to Ms. Farias identified the reason for her recommendation as Ms. Farias' "continued unacceptable physical and verbal conduct with students, most recently an incident on March 12, 2004 in which you pushed a student".
- After a pretermination hearing on April 26, 2004, the Providence School Board voted to "affirm the recommendation of the Superintendent" and terminated Ms. Farias. The School Board's written decision is dated April 28, 2004. PSB Ex. 10.³
- Ms. Farias became aware that the written reprimand she had signed on April 2, 2003 was being presented by Mr. Zimmerman for consideration by the Providence School Board during the April 26, 2004 pretermination hearing. Tr. Vol.VII pp. 10-12; 24-25; Brief of Ana Farias at page 17. She filed a grievance under the terms of the collective bargaining agreement to challenge the "improper placement of materials in her personnel file" on May 4, 2004. This grievance was denied on June 14, 2004. Ms. Farias did not submit the grievance to arbitration.⁴ PSB Ex. 16-22; Tr. Vol.VII pp. 12-13.
- Ms.Farias requested a hearing before the full board on the issue of her termination, and following an evidentiary hearing, the Board voted, 6-3 to sustain its prior decision to terminate Ms. Farias. The reason for this decision was described as Ms. Farias' "continued unacceptable physical and verbal conduct with students, most recently an incident on March 12, 2004 in which you pushed a student". PSB Ex. 11. From this decision, dated November 29, 2004, Ms. Farias filed her appeal with the Commissioner of Education.
- The written reprimand issued by Principal Susan Chin and signed by Ms. Farias on April 2, 2003 was part of her personnel file at the time of hearing in this matter before the Commissioner's designee. Tr. Vol.VII p.23.

³ The April 28, 2004 decision states that the termination is based on "good and just cause" but does not state the factual basis. Reference is made to Ms. Farias' "conduct and actions" which demonstrate more than adequate support for the Superintendent's recommendation.

⁴ Ms. Farias testified that she understood arbitration to be important, and that she sought to have the grievance brought to arbitration, but for reasons that were unclear to her, it was not arbitrated. Tr. Vol. VII pp. 12-13.

Positions of the Parties

Ana Farias

Counsel for Ms. Farias argues that she has been terminated as the result of a minor incident on March 12, 2004 which has been blown out of proportion. This incident consisted, at most, of Ms. Farias pushing a student and stating to her “I’m sick of you”. As a tenured teacher, Ms. Farias’ termination must be supported by evidence of good and just cause. The record before the Commissioner is insufficient to demonstrate good cause. To the extent that the Providence School Board has presented evidence of prior misconduct, counsel argues that due process prevents such evidence from being considered. First, the written notices provided to Ms. Farias at the time of the School Board’s proceedings were insufficient to notify her of any other specific incidents, other than that of March 12, 2004. The notices furthermore make no mention of disciplinary history or a written reprimand for prior misconduct. Ms. Farias denies she ever engaged in the misconduct described in the so-called letter of reprimand.

Additionally, there was no formal statement of cause provided by the School Board to Ms. Farias, as is required under R.I.G.L. 16-13-3 and 16-13-4. The absence of a statement of cause violates the Teacher Tenure Act. The remedy for such statutory violation, counsel argues implicitly, is to invalidate Ms. Farias’ termination.⁵

Ms. Farias asserts that the notices from the School Board do not include a reference to her alleged disciplinary history, and with good reason. She denies that she in fact had a disciplinary record with the School Department. Counsel for Ms. Farias challenged what he referred to as a “purported” letter of reprimand. There are many reasons why the letter from Ms. Chin should not be viewed as a reprimand. There was no rudimentary due process in the manner in which Principal Chin approached her investigation of three parental complaints against Ms. Farias in late 2002 and early 2003. Her discussions with Ms. Farias about what happened with respect to these students did not take place in a disciplinary context, nor was her union representative present. Ms. Farias contends, contrary to Ms. Chin’s testimony, that she did not admit⁶ that she had inappropriate physical contact with these children. When a written document was thereafter presented to her by Ms. Chin, it was during a time when a relative was extremely ill and Ms. Farias was emotionally distraught. For this reason, she signed the document on April 2, 2003, but it was with the disclaimer that her signature did not constitute her agreement with its content. Her understanding, based on discussions she had with representatives of her union, was that she could challenge this document at a later time, if and when it was actually placed in her personnel file.

Furthermore, the letter was not placed in her file as Ms. Chin indicated it would be. On two subsequent dates, June 19, 2003 and March 9, 2004, when Ms. Farias

⁵ After initially raising defective procedure in a preliminary motion to dismiss, counsel for Ms. Farias decided that he would raise procedural deficiencies as part of the case on the merits. Tr. Vol. I pp.4-32.

⁶At the hearing before the Commissioner’s designee, Ms. Farias disavowed ever touching students inappropriately. Tr. Vol.III pp. 434-437, 439, 445-446, 479-480.

reviewed her personnel file at the Human Resources Office, she did not find the letter from Ms. Chin in her personnel file.⁷ This was consistent with her contention that these accusations were never verified. As a practical matter, if the principal had verified that Ms. Farias had twisted a little girl's arm repeatedly and had pulled on two students' clothing, choking them, "a reasonable person would have expected at least a suspension or worse" (Brief p.18) This did not happen because these allegations were never verified. Ms. Chin's decision at that time – not to suspend or terminate Ms. Farias – is an indication of how unsubstantiated she viewed these allegations at that time.

Only now is the administration seeking to recast these prior allegations in a different light and characterize Ms. Chin's letter as a reprimand. The fact that the so-called letter of reprimand was placed in Ms. Farias personnel file only after allegations of a fourth incident were made against her is consistent with the notion that Ms. Chin's letter attained the status of a "letter of reprimand" establishing her "disciplinary record" only when there was need to make a stronger case against her in 2004. Aware of the contract's requirements, and realizing that she had no disciplinary record according to her personnel file, Mr. Zimmerman inserted Ms. Chin's 2003 letter to Ms. Farias into her file in March of 2004 so that it could be used as evidence against her in the anticipated termination proceedings.

The one specific incident relied on by the School Board in its termination of Ms. Farias is at most a momentary lapse of judgement on Ms. Farias' part, if it occurred at all. The eyewitnesses disagree on whether Ms. Farias said anything when she allegedly pushed the child. The teacher assistant standing close by did not hear Ms. Farias yell, "I'm sick of you" or say anything at all to the student. Ms. Farias may have used two hands to put the student in the line to return to class, but she does not even recall this. The student was not hurt in any way, and in fact, when the principal went down to Ms. Farias' classroom a few minutes later, she was eating ice cream with the other students in her class. Counsel submits that this single act does not constitute just cause for the termination of a tenured teacher, but was an over-reaction of Ms. Chin, who was upset with Ms. Farias for other reasons.⁸

Other arguments raised against Ms. Farias' termination include the fact the Providence School Board did not provide her with policies which would have clarified when and how she was to discipline students. On each occasion when Principal Chin criticized her for inappropriate physical contact with students, she did not clarify what she meant or provide Ms. Farias with any written description of exactly what teachers were permitted to do in disciplining students. Counsel argues that Ms. Chin was

⁷ Throughout several sessions of the hearing, an incorrect premise was that the letter of reprimand had *never* become a part of Ms. Farias personnel file, and that she had *never grieved* its placement in her file. In the process of checking on the accuracy of another exhibit, the parties became aware that in fact the April 2, 2003 letter of reprimand was placed in Ms. Farias' file between March 12 and March 16, 2004 and that this had been grieved by Ms. Farias on May 4, 2004.

⁸ Evidence was offered to show that Ms. Chin was retaliating against Ms. Farias because she had complained to the Central Office with respect to Ms. Chin's dismissal policy, which Ms. Farias thought was leaving the children in the cold unnecessarily.

obligated to give Ms. Farias written, or at least verbal, instructions on appropriate disciplinary techniques to guide her behavior with these young children.

Assuming, that Ms. Farias “used force to discipline the child in this matter” (Brief p.22) in order for just cause to exist for termination, there must be a finding that the force she used was excessive under common law. Ms. Farias submits that there is no evidence that she used excessive force in placing this student in line on March 12, 2004. The nurse’s examination indicated that the student had not suffered any injury. Similarly, the students whose parents complained of inappropriate contact in 2003 were not hurt. In fact, they all remained in Ms. Farias’ class for the remainder of that school year. Applying common law standards to this situation, then, counsel submits that Ms. Farias committed no misconduct.

Board of Regents Regulations on Physical Restraint, which became effective on September 1, 2002, are applicable in this matter to the extent they modify common law rules on permitted contact with children. If Ms. Farias violated the Physical Restraint Regulations, this cannot constitute just cause for her termination because the School Board itself has been guilty of violating these regulations. The Providence School Board had not informed teachers of appropriate responses to student behavior that may require the use of physical force and/or crisis intervention. (Brief p.25) In addition, the record reveals that no training was given to Ms. Farias with respect to the manner of touching or disciplining children. Both of these requirements were ignored by the Providence School Board. On this basis, terminating Ms. Farias for alleged inappropriate touching of a student is unfair and violates her due process rights.

For these reasons, Ms. Farias requests that the decision of the Providence School Board be reversed and that she be reinstated to her position.

Providence School Board

The basic position of the School Board is that this is a case of progressive discipline in which prior sanctions were ineffective in preventing Ana Farias from engaging in aggressive physical contact with the children. Counsel points to evidence in the record documenting that in school year 2002-2003, Ms. Farias was disciplined for inappropriate conduct involving three children in her class. One of these students complained that he had been choked when she grabbed the back of his closed coat, and another was afraid to come to school because Ms. Farias had twisted her wrist on several occasions. Susan Chin, the principal of the Mary E. Fogarty School, investigated parental complaints and found that the incidents occurred. She issued a verbal reprimand to Ms. Farias, directing her “not to put her hands on the children”. Within days of meeting with Ms. Farias and giving her the verbal reprimand, Ms. Chin received another report that Ms. Farias had acted aggressively toward one of her students. The January 16, 2003 written complaint from a parent described her son’s report to her that Ms. Farias had yelled at him, grabbed him by the back of the shirt, picking him up. This conduct

was alleged to have begun in November or December of 2002 and continued into January of 2003.

After speaking with Ms. Farias on January 23, 2003, Principal Chin prepared a written reprimand which documented all three complaints and warned Ms. Farias that any future incidents of inappropriate physical contact with students could result in termination of her employment. The document noted that a copy would be placed in Ms. Farias' personnel file. The written reprimand was presented to Ms. Farias in mid-March of 2003 for her signature. After consulting with her union representative with respect to her rights in the matter, Ms. Farias signed the letter from Ms. Chin on April 2, 2003. Ms. Chin gave Ms. Farias a copy of the letter and sent the original to the Human Resources Office for placement in Ms. Farias' personnel file.

Less than one year after receiving this reprimand, Ms. Farias again engaged in conduct described by counsel as "explosive behavior". She pushed one of her first grade students into the wall as the child waited in line outside the door to the bathroom and shouted "I'm sick of you". The child was reduced to tears, and two staff members who saw the incident were deeply shaken. They reported the incident to the principal. With her disciplinary history, there is a strong factual foundation for the charge that Ms. Farias has engaged in "continued unacceptable physical and verbal conduct with students, most recently an incident on March 12, 2004 in which you pushed a student". These facts establish the good and just cause for her termination by the Providence School Board.

Although it is not clear why the letter of reprimand was missing from the file in March of 2004, counsel argues that the letter of reprimand nonetheless can be used to establish Ms. Farias' disciplinary record. The reprimand was effective at the time it was issued, Ms. Farias signed it and received a copy. She was on notice that a copy was being forwarded to her personnel file. If she wanted to dispute the reprimand, she was required to file a grievance when it was issued to her in April of 2003. The notion that an arbitrarily-chosen date when a teacher might verify that a written reprimand has been placed in the file is the "date of occurrence" of the grievance is illogical. A teacher is aggrieved at the time he or she receives a written reprimand, not at some unspecified later date when they might decide to check their personnel file. In any event, Ms. Farias ultimately did file a grievance with respect to the written reprimand's placement in her personnel file and did not appeal the administration's denial of her grievance to arbitration.

Ms. Chin's testimony with respect to her investigation of the three complaints in January of 2003 also establishes that the allegations of misconduct against Ms. Farias were true and that these incidents did, in fact happen. Counsel directs us to Ms. Chin's testimony about her interviews of Ms. Farias and Ms. Farias' unambiguous admissions that she had done what the children alleged. Despite an argument that the discussion was that children "misconstrued" her actions, Ms. Chin, on rebuttal, confirmed that Ms. Farias admitted engaging in this misconduct. She sought to excuse it by stating that the children were not listening to her. The record in this case thus establishes the prior misconduct independently of the disciplinary record that resulted from it.

With respect to the argument made by counsel for Ms. Farias that she did not receive a statement of cause as required under the statute, the School Board argues that a statement of cause was given and that it consists of the multiple written notices provided to Ms. Farias in the course of proceedings before the School Board. These notices made the basis for Ms. Farias' termination "eminently plain" (Tr. Vol. I pp. 8-9). The charge against her was (1) her pushing of a student on March 12, 2004, and (2) her history of inappropriate physical conduct with students as memorialized in a letter of reprimand. (Tr. Vol.I pp. 9, 20-21) Details of prior incidents for which Ms. Farias received a written reprimand were attached in a "chronology", and a copy provided to Ms. Farias when it was issued in April of 2003. Her counsel was also provided a copy during the course of termination proceedings before the Board.

In response to Ms. Farias argument that the School Board failed to provide her with information on its physical restraint procedures and to provide her training as required under the Board of Regents Physical Restraint Regulations, counsel submits that at no time has a violation of these regulations been advanced as a basis for Ms. Farias' termination. The March 12, 2004 incident was a situation in which there is no evidence whatsoever that the student was engaged in dangerous behavior when she was pushed, or that she was doing anything threatening or even out of the ordinary. There is no evidence to suggest that Ms. Farias was responding to a crisis on any one of the occasions on which her conduct was unacceptable.

The notion that the Board has failed to prove that Ms. Farias used excessive force to discipline the student involved in the March 12, 2004 incident is also challenged. The drawing of boundaries for reasonable corporal punishment occurs in a criminal law setting, not in a public school setting. There was no contention by Ms. Farias that any of these students was doing anything wrong or violating school rules in anyway. Thus, the evidence does not support the argument that Ms. Farias was permitted to have such contact as was necessary to inflict reasonable corporal punishment on these students.

DECISION

Counsel for Ms. Farias argues that Ana Farias' termination is based on one incident, and one incident only: the pushing of a student into line on March 12, 2004. We find that this is the only misconduct of which she was provided sufficient written notice. The documentation from the School Board⁹ notified her that the basis for her termination was:

Continued unacceptable physical and verbal conduct with students, most recently an incident on March 12, 2004 in which you pushed a student.

⁹ Actually a succession of written notices from Mr. Zimmerman (on the Superintendent's behalf), and the Providence School Board, PSB Ex.8-11. The initial termination decision of the School Board, dated April 28, 2004 states that her dismissal is for "good and just cause" citing "Ms. Farias' conduct and actions". See PSB Ex. 10.

The use of the phrase “continued unacceptable physical and verbal conduct with students” is vague. Even though school officials may have clarified in meetings with Ms. Farias and her counsel that there were no *additional* allegations of misconduct they planned on presenting to the board and that the reference was to her disciplinary record, the formal notice itself is unclear. The Board’s April 28, 2004 decision to terminate Ms. Farias further obfuscates the reason for her discharge. The decision indicates that the Board has found “good and just cause” to terminate Ms. Farias based on:

Its conclusion, after reviewing the evidence presented by the Administration as well as the presentation of information on Ms. Farias’ behalf, that Ms. Farias’ conduct and actions more than adequately demonstrate support for the Superintendent’s recommendation.

There is no written specification of the factual basis for the Board’s decision. The Board was required in its November 29, 2004 decision, made after an evidentiary hearing,¹⁰ to set forth its reasons and a brief summary of the evidence on which it relied. It did not. The exact reason for Ms. Farias’ termination remained unclarified. Instead, the post-hearing decision reverted to the pre-termination description of “continued unacceptable physical and verbal conduct with students, most recently an incident on March 12, 2004 in which you pushed a student”.

The formal documentation supports Ms. Farias’ argument that the only incident of misconduct of which she was formally notified throughout this process was the March 12, 2004 incident. Therefore, the Board has restricted its case of “good and just cause” to this single incident. The Providence School Board may have weighed proof of other prior misconduct in its proceedings. Although it is difficult to tell from the Board’s decision, the Board may have relied on incidents prior to March 12, 2004 as a basis for Ms. Farias’ termination. Given the language of the notice sent to her and the deficiencies in the Board’s written decision, it is not possible to determine exactly what the School Board took into account in its decision.

For the procedural reasons previously set forth, our de novo review of “good and just cause” is confined to the March 12, 2004 incident. This is not to say that Ms. Farias’ disciplinary history cannot be considered, but it is necessary to distinguish consideration of her disciplinary history, which is clearly legitimate, from what the School Board apparently did – punish Ms. Farias again for previous misconduct which had already received the lesser sanctions of a verbal and written reprimand. Although the notices sent to Ms. Farias did not reference her disciplinary history, consideration of such history is part of every case of employee discipline and need not be specifically noticed. In this case it is the disciplinary history which validates termination for a single act of pushing a student.

¹⁰ See Hobson v. South Kingstown School Committee, April 4, 1988.

Ms. Farias had a significant and troubling disciplinary history evidenced by a letter of reprimand issued to her by Principal Susan Chin on April 2, 2003. It constitutes prior discipline for several serious acts of misconduct occurring in school year 2002-2003. The findings in the letter of reprimand indicate that on several occasions Ms. Farias assaulted students in her class. One of the children told her father that she was afraid to come to school because Ms. Farias had twisted her wrist on several occasions. The written reprimand establishes that Ms. Farias had been clearly warned that any further inappropriate behavior, including future incidents of inappropriate physical contact with students, would result in additional disciplinary action, including possible termination of her employment. The written reprimand followed a verbal reprimand with respect to the first two incidents just a short time prior to receipt of the third complaint on January 16, 2003.

The focus throughout much of the hearing was on the issue of whether Principal Chin's written reprimand could be accepted into evidence. Testimony was presented¹¹ that in March of 2004 Mr. Donald Zimmerman, the director of Human Resources for the Providence school department discovered that the written reprimand was not in Ms. Farias' file and that he *then* placed there. Ms. Farias argued she actually had no disciplinary record created in conformity with the teachers' contract. Evidence and arguments were submitted on the issue of when Ms. Farias would have been "aggrieved" by the letter of reprimand. An incorrect premise, shared by both of the parties until the final day of hearing, was that Ms. Farias¹² had never utilized the grievance process to challenge the written reprimand because of a delay in placing it in her personnel file. Only on the last day of hearing in this matter was the record supplemented by additional evidence which established that Ms. Farias did learn of the placement of the written reprimand in her file in March of 2004 and did file a grievance under the collective bargaining agreement to have it removed. She did not submit her grievance to arbitration. The reprimand remained in her personnel file.

As a result, all issues she has raised with respect to the validity of the letter of reprimand and the ability of the School Board to rely on it in these proceedings are not before the hearing officer. Arguments presented with respect to defects in the process used by Ms. Chin, including her questioning of Ms. Farias without the presence of a representative from her union, raise contractual issues which could and should have been raised in the grievance process. The effect of an alleged delay in placing the reprimand in her personnel file should have been part and parcel of the grievance Ms. Farias submitted.¹³ The fact that Ms. Farias availed herself of the grievance process clearly

¹¹ Presented on the second day of hearing, June 2, 2005.

¹² Because of her perception that she would not be "aggrieved" by the letter of reprimand until it was placed in her personnel file.

¹³ We would note that the Commissioner does not have jurisdiction over the placement of letters of reprimand in a teacher's personnel file. See Pardo v. Johnston School Committee, decision of the Commissioner dated November 20, 2003.

precludes consideration of these contractual issues by the Commissioner, whose jurisdiction over them is doubtful in any event.¹⁴

It is the March 12, 2004 incident which precipitated her termination by the Board. We find that on that day Ms. Farias intentionally pushed a student and yelled at her “I’m sick of you”. The accounts of the two eyewitnesses were not at variance on the important point – that the child was shoved without any provocation or warning. Whether Ms. Farias yelled at the time she pushed this child is resolved on the basis of the child’s statement to Mr. Zimmerman shortly after the incident happened. Ms. Farias’ testimony that she had no memory of the incident was simply not credible.

In light of Ms. Farias’ disciplinary history – a verbal reprimand on or about January 8, 2003 and a written reprimand issued on April 2, 2003 – the March 12, 2004 incident in which she again had unacceptable physical contact with a student presented “good and just cause” for her termination. The argument that the March 12, 2004 incident was not egregious enough to terminate her is rejected. This argument ignores the disciplinary record which her employer was entitled to take into account in determining the sanction to be imposed. Although we may agree that the March 12th incident would not, in and of itself, justify the termination of a tenured teacher, a teacher with Ms. Farias’ disciplinary history presents an entirely different case. She had received sufficient warnings of what the response to any further misconduct involving students would be. The School Board is under an obligation to ensure the physical safety of students and to maintain an environment free from aggressive behavior by teachers and other staff. Based on this record, the Providence School Board’s retention of Ms. Farias would not have fulfilled these obligations.

The argument that the School Board failed to prove that Ms. Farias inflicted excessive corporal punishment is found to be without merit as inapplicable to the facts of this case- there are no facts that the March 12, 2004 incident, or on any of the other occasions on which she was previously disciplined, involved her infliction of corporal punishment.¹⁵ Similarly, her assertion that the School Board cannot terminate her because she was never trained in proper physical restraint interventions with students is without merit. The situation at issue, i.e. the pushing of a student on March 12, 2004 was not one in which it was alleged that Ms. Farias’ was attempting to intervene in a crisis, or to prevent students from injuring themselves or others. The record does not indicate even an allegation that a crisis situation existed with respect to the prior incidents. Thus, the Board has not been shown to have breached any responsibility to Ms. Farias or that a situation existed which would explain or excuse Ms. Farias’ misconduct.

¹⁴ The issue of whether the School Board could rely on a letter of reprimand *never* placed in Ms. Farias personnel file (and not ever the subject of a grievance) might have presented a case of pendent jurisdiction by the Commissioner. Fortunately, because the letter was placed in her file at the time of her termination proceedings in this case and was the subject of a grievance, we need not deal with this complex issue.

¹⁵ Which is now expressly prohibited by the Regents Regulations on Physical Restraint.

As discussed earlier in this decision, the School Board did not provide Ms. Farias with a clear statement of cause under the statute.¹⁶ The notice's implication that other prior misconduct, unspecified, was at issue was inaccurate according to the clarification provided in the opening statement by Board counsel. We are constrained to find that defects in the notice to Ms. Farias have not been shown to have placed her at a disadvantage in the presentation of her case at this level. As in the recent case of Richardson v. Providence School Board¹⁷ the de novo hearing process has, in this case, provided an effective remedy for this violation. We direct the Providence School Board to review its teacher termination procedures to ensure that they comply with both due process and statutory requirements. A written description of this review must be submitted to the chief legal counsel for the Commissioner no later than January 1, 2007.

The appeal is denied and dismissed.

For the Commissioner,

Kathleen S. Murray, Hearing Officer

APPROVED:

Peter McWalters, Commissioner

November 22, 2006
Date

¹⁶ This was raised as a preliminary issue, and a decision was made to consolidate arguments with respect to this procedural defect in the hearing on the merits.

¹⁷ Decision of the Commissioner dated May 25, 2005.