STATE OF WISCONSIN

STATE PERSONNEL BOARD

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JOHN J. PFANKUCH,
Appellant,

v.

WILBUR J. SCHMIDT, Secretary,
Department of Health and Social Services.
Respondent.

OPINION
AND
ORDER

Case No. 73-45

* *

Before JULIAN, Vice-Chairman; BRECHER; and STEININGER.

JULIAN, writing for himself and Board Members BRECHER and STEININGER.

FACTS

The Appellant has been employed as a teacher at the Kettle Moraine School for Boys, a correction institution for boys, for approximately eleven years.

On March 21, 1973, the Appellant and Walter A. Cummings, another teacher, arranged to conduct their general mathematics class jointly to show a film in the latter's classroom during the fourth period.

Upon entering the classroom, Gervace Hinton, age fifteen or sixteen, a student at the School, directed abusive language at the Appellant. Later, while rewinding the film and while the class was being addressed by Mr. Cummings, Mr. Hinton kicked the Appellant a number of times in the back of the lower legs. In each case, the Appellant took no action against Mr. Hinton.

The Appellant then took a position sitting on one of the desks near the front and to the side of the class so that he would be in a good position to join in the discussion of the film being led by Mr. Cummings. Mr. Hinton was seated immediately across the aisle from him and in a low tone commented to the Appellant, "I'll beat your ass." The Appellant admonished Mr. Hinton to be the kind of young man the Appellant knew he could be. Mr. Hinton replied in a voice sufficiently loud so as to be audible to the class, "You God-damned faggot." The Appellant rose from the desk on which he was sitting, stepped across the aisle, and with

an open hand, slapped Mr. Hinton a glancing blow across the back of the head. The Appellant then stepped in front of Mr. Hinton and told him that he could try to "take" him if he wanted to.

The Appellant then arranged to dismiss his class and went directly to Donald W. Gudmanson, the Principal at the School, and reported the incident. He told Mr. Gudmanson that he intended to advise Paul D. Prast, the Superintendent of the School, concerning the incident, notwithstanding Mr. Gudmanson's statement that such was not necessary. Later in the day, the Appellant met Mr. Prast to report the incident to him, because other similar instances had occurred in the past and he had promised to personally call any recurrances to Mr. Prast's attention.

On March 21, Mr. Gudmanson also wrote the Appellant a letter in which he reproached him for departing from the rule of force and for challenging a boy to a physical encounter, a reference to the Appellant's invitation to Mr. Hinton to try to "take" him. Copies of the letter were sent to Mr. Prast and put into the Appellant's personnel file.

The School policy on the use of force against students was contained in the Kettle Moraine School for Boys rule on the use of force, which is as follows:

> The use of force by our staff as a disciplinary or treatment measure is forbidden. It is contrary to law and the state policy of the Department of Health and Social Services.
>
> Use of force is permissible only as a safety measure as follows:
> 1. To protect the lives or safety of any person;
> 2. To protect property against damage; and
> 3. To restrain a boy from an unauthorized act
>
> But, in any event, force should be used only to the extent necessary to accomplish the above-stated purposes; and only restraining techniques should be employed.
>
> When use of force is deemed necessary by any member of our staff, a full report of the incident should be made to the head of the department. All such reports will be referred to the Superintendent.

Annually, teachers were required to read and sign that they understood the School Rule of Force. The Appellant, in his testimony, acknowledged

familiarity with the rule.

Teachers were instructed that when students misbehave, the students were to be sent to the office and a written report filed with the office on the incident.

On March 26, 1973, Mr. Prast wrote the Appellant a letter advising him that he was suspended for three days for striking a student on March 21 in Mr. Cummings' room during the fourth period. The letter referred to the Appellant having been counseled regarding the same problem on numerous occasions and having been previously suspended twice for the use of physical force, most recently on September, 1972. One of these previous suspensions was for thirty days.

None of the foregoing facts are in contention and we find them to be the material facts in the case.

SUFFICIENCY OF THE NOTICE OF DISCIPLINE

Appellant contends that his notice of the charge against him was defective, since the notice did not specify the particular rule that the School claimed he had violated. We have recently had occasion to enumerate the principles of due process which govern the sufficiency of notices of discipline. Beauchaine v. Schmidt, Wis. Pers. Bd. Case No. 73-38 (October 18, 1973). The suspension letter, which constituted the notice of discipline to the employe in this proceeding, met the requirements of due process that we enumerated in Beauchaine. The notice requirement of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution is a flexible concept designed to insure the employe adequate notice of the proceeding and the charges against him, and to afford him a reasonable and fair opportunity to contest those charges. In this case the Appellant was advised that he was suspended for striking a student in violation of the School's rule concerning the use of force. The notice of discipline further alleged that he was fully aware of the rule and had been counseled before concerning its violation. The notice gave him a fair understanding

of what he was alleged to have done. In the circumstances of this case only, we find that due process does not require that the notice specify the rule he was alleged to have violated. State ex rel Messner v. Milwaukee County Civil Service Commission, 56 Wis. 2d 438 (1972).

However, a note of caution must be added, so that those who read this opinion do not get the impression that generally notices of discipline need not contain a citation to the rule violated. Such an impression would be erroneous. We believe it is preferable, and in a particular case, depending on the circumstances, it may be required that notices of discipline cite with particularity, rather than generally, the rule violated. Each case must be dealt with separately and appointing authorities are advised that notices of discipline should cite with specificity the rule violated, even though, under the circumstances of a particular case, due process may not so require.

DOUBLE JEOPARDY

The concept of double jeopardy is not applicable to this case.[1/] Appellant urges that Mr. Gudmanson's letter to him the day of the incident constitutes a letter of reprimand and, therefore, the three-day suspension constitutes a second penalty for the same offense. While the letter might be so construed, we do not adopt this interpretation. Moreover, the School's rule on the use of force states that reports on incidents involving the use of force will be referred to the Superintendent. The Appellant had been disciplined by Mr. Prast in the past for the use of force and undoubtedly knew that Mr. Gudmanson's letter was by no means the final disposition of the March 21 incident.

1/ The term "double jeopardy" is a misnomer, since in constitutional law it refers only to criminal cases. In labor arbitration cases, it has come to mean "that once discipline for a given offense has been imposed and accepted it cannot thereafter be increased." Elkouri and Elkouri, How Arbitration Works, 3rd Ed., (1973), pp. 636-638. "The double jeopardy concept has been held inapplicable where the preliminary action taken against the employe may not reasonably be considered final." Ibid., p. 637.

THE USE OF FORCE

The School rule concerning the use of force applies to the instant case. The Appellant struck a student. The word force means the use of physical power to overcome or restrain a person. Hitting a blow with the hand is clearly a use of force. Moreover, the context of all of the words in the School's Rule of Force indicates that the prohibition is against the use of all physical force as a disciplinary measure. Force may be used as a safety measure, but in such cases (not present here) "only restraining techniques should be employed." While most of the dictionary meanings of the word force suggest a more violent action than a slap on the head, we do not interpret the word to exclude force that is the use of minimal quantities of strength and power. Appellant argues that the Rule of Force does not apply, since his slap lacked strong physical coercion and violence. In Reinke v. Personnel Board, 53 Wis. 2d 123, 140 (1971), the Court said, "Physical force may or may not be an element of a slapping, depending on the circumstances." Where a teacher responds to a student's name calling with a slap on the head, we conclude that physical force is being used to discipline the student.

Appellant argues that, even if the rule applies, under its terms, his action was to protect persons and property and prevent unauthorized acts. Appellant, in his testimony, explained that he slapped Mr. Hinton because he was apprehensive concerning what Mr. Hinton might do next, and further, Appellant mentioned that he had been "jumped" once before. He further explained that after being called a "faggot" in front of the class, that he was concerned about his authority position in the classroom. Appellant may indeed have been concerned by the drift of events, yet he could very easily have used the normal procedures to deal with Mr. Hinton's misconduct. Certainly the name calling did not put Appellant in fear of his safety. No property was threatened. He was not restraining an unauthorized act by Mr. Hinton, because the act had occurred. Moreover, the force used was not a

restraining technique; it was a slap to discipline Mr. Hinton and to make clear to all of the students Appellant's authority. We find that Appellant's action was in direct contravention of the use of force rule.

Finally, Appellant urges that since Mr. Prast did not ascertain the degree of force used, just cause cannot be determined. Pursuing this line of argument further, he urges that since Mr. Prast was derelict in his duty, the suspension was arbitrary. We do not read Reinke to impose such a duty on appointing authorities. Mr. Prast received reports from Mr. Gudmanson and spoke to the Appellant and Mr. Hinton. He relied on Appellant's written admission that he had lightly slapped Mr. Hinton. At the hearing, Mr. Cummings testified that the Appellant "cuffed" Mr. Hinton on the back of the head. Mr. Prince, a student called as a witness for the Appellant, demonstrated the amount of force Appellant employed in slapping Mr. Hinton on the back of the head. All of this evidence substantiates the fact that the Appellant slapped Mr. Hinton in the back of the head sufficiently hard and in our opinion, it constituted the unauthorized use of force against a student.

We conclude that the Appellant struck Mr. Hinton in violation of the School rule and, in view of the Appellant's two prior suspensions for the same infraction, the three-day suspension was for just cause.

ORDER

It is ordered that the action of the appointing authority suspending the Appellant is sustained.

December 20, 1973.

STATE PERSONNEL BOARD

BY

Percy L. Julian, Jr., Vice-Chairman