

BEFORE THE IMPARTIAL HEARING OFFICER

In the Matter of the Grievance of

GLORIA TOMLINSON

Under the Grievance Procedure of

MILWAUKEE PUBLIC SCHOOLS

Case ID: 22.0072

Case Type: IHO

DECISION NO. 39810

Appearances:

Nicholas Fairweather, Hawks Quindel, 409 E Main St, Madison, Wisconsin, appearing on behalf of Gloria Tomlinson.

Richard Anderson, 5225 West Vliet Street, Milwaukee, Wisconsin, appearing on behalf of the Milwaukee Board of School Directors and Milwaukee Public Schools.

DECISION OF THE IMPARTIAL HEARING OFFICER

On August 22, 2022, Nicholas Fairweather and the Milwaukee Public Schools requested that the Wisconsin Employment Relations Commission appoint Katherine Scott, a member of the Commission's staff, to serve as the Impartial Hearing Officer (IHO) in a proceeding concerning Gloria Tomlinson's termination. A hearing was held on January 5, 2023, by video conference. The hearing was transcribed, and the parties submitted written closing arguments on February 6, 2023. Having considered the evidence, the arguments of the parties, and the record as a whole, I issue the following decision.

ISSUE

Did the MPS have just cause to terminate Tomlinson?

FACTS

Gloria Tomlinson (herein, G.T.) was hired as a children's health assistant at Audubon Middle School, part of the Milwaukee Public Schools (herein, MPS). G.T. was a one-on-one

assistant for A, an autistic, nonverbal middle school student. As a children's health assistant, she was responsible for helping A with all aspects of his school day, including walking to and from the bus, eating, toileting, and other needs. A had a history of running. He also had a history of striking at G.T., other employees, and classmates.

If A bolted, G.T. was expected to maintain close distance and line of sight supervision, but she was not supposed to restrain A. Instead, if he tried to leave the building or otherwise jeopardize his safety or the safety of others, G.T. was supposed to call a school safety officer. In fact, G.T. had done so when A had become violent on previous occasions.

On April 5, 2022, assistant principal J.K. heard screaming and saw A running into a classroom. J.K., teacher S.M., and school safety officer A.H. comforted A, who was visibly upset: screaming, throwing things, and crying so hard he spit up. J.K. noticed three large, red marks on the back of A's neck, near the neckline of his shirt. They looked like fingernail scratches. One was so deep it drew blood.

G.T. entered the room shortly after and said, "Oh, that was from us tussling." J.K. took a photo of A's injury and escorted A to the school nurse. The nurse, K.S., noticed another abrasion running horizontally across A's neck. G.T. followed J.K. and A to the nurse and asked for medical attention as well, but the nurse said she could not assist adults.

Teacher H.S. also testified that, later that day, she noticed that A had a "welt and a bruise" on his left cheek that was not there at the start of the school day. H.S. also took a photo.

After this incident was reported, Audubon Principal Leon Groce initiated an investigation and G.T. was suspended. A review of security camera footage showed G.T. and A physically interacting in a hallway and stairwell shortly before A ran into S.M.'s classroom, screaming and injured. G.T. and A can be seen only intermittently on the security camera footage; there are several periods where they are not visible. G.T. testified that she hadn't called school safety for assistance in bringing A back to the classroom because she lost her walkie talkie during the altercation behind the stairs, but the security footage shows she is holding her walkie talkie after the altercation had already begun and after it ended.

The MPS held a disciplinary hearing on April 8, 2022, but before a final written decision was issued, children's health assistant K.J. reported that the day after the incident – April 6, 2022 – G.T. told K.J. that she (G.T.) had "beat the shit out of the fat motherfucker" (A) and had made sure to stay out of the view of the hallway cameras. K.J. reported this information to teacher H.S., who relayed it to Principal Groce.

After this new information came to light, G.T. was placed on an unpaid suspension and not permitted to return to work. A second disciplinary hearing was held on April 20, 2022.

On June 7, 2022, Employment Relations Specialist/Hearing Officer Larry Cote found that G.T. engaged in acts of corporal punishment and purposefully engaged in the behavior where security cameras could not record her conduct. He further found that G.T. lied in her disciplinary

hearings and knowingly provided false information to avoid being held accountable for her actions. Accordingly, G.T. received a letter of termination on June 7, 2022.

Cote found that G.T.'s actions violated Administrative Policy 6.07(2)(h), (n), (p) and (q) (Employee Rules of Conduct); Administrative Policy 8.29 (Corporal Punishment); the Core Beliefs, Customer Service, Employee Rules of Conduct, and Corporal Punishment and Safety provisions of the Employee Handbook; Audubon School Staff Manual Sec. 3.01 (Employee Rules of Conduct); and Audubon School Staff Manual Sec. 7.08 (Corporal Punishment).

Cote further found that G.T.'s dishonesty at the first disciplinary hearing violated Administrative Policy 6.07 (2)(b), (h), and (q) (Employee Rules of Conduct); the Customer Service, Professional Conduct and Employee Rules of Conduct provisions of the Employee Handbook; the Audubon School Staff Manual Sec. 3.01 (Employee Rules of Conduct); and the Audubon School Staff Manual Sec. 3.03 (Professional Conduct).

G.T. filed a grievance regarding her termination. Employment Relations Specialist Elizabeth Fiergola issued a written decision denying G.T.'s grievance on July 27, 2022, because the weight of the credible evidence supported a conclusion that the MPS had just cause to terminate G.T.

G.T. had been disciplined for a similar, previous incident with a special needs student she had been assigned to care for in the high school. She was alleged to have struck the girl in the face. After a Department of Human Services hearing, G.T. was transferred to the middle school and ordered to take nonviolent intervention training.

DISCUSSION

The Standard of Review

I begin my discussion by first addressing the standard of review. Part II (B) of the MPS's Employee Handbook states that "non-probationary employees shall only be disciplined or discharged for just cause." Thus, employee discipline will be reviewed under a just cause standard. Although the Handbook does not define just cause, a finding of just cause generally requires the employer to prove that (1) the employee committed conduct for which discipline is warranted and (2) the discipline issued is consistent with the seriousness of the misconduct.

Part II (B) of the Employee Handbook further states that the MPS has a policy of progressive discipline, which depends "on the specific behavior and the frequency of occurrences." In other words, serious behaviors may justify departure from progressive discipline, though the provision does not specify which behaviors may warrant departure from progression.

G.T. argues that just cause requires the MPS to prove that she committed the conduct by "clear and convincing evidence." The clear and convincing evidence standard requires that the evidence is substantially more likely to be true than untrue. The Grievance Procedure laid out in

the MPS Employee Handbook is silent on the standard used in IHO hearings. However, IHO hearings for cases arising from the MPS have used a “preponderance of the evidence” standard, which only requires that the evidence shows that it is more likely than not that G.T. committed the conduct of which she is accused. *In the Matter of the Grievance of Lorenzo Fountain* (Dec. No. 38822, WERC 3/21). Therefore, the evidence presented at the hearing will be reviewed under a preponderance of the evidence standard.

Corporal Punishment

Administrative Policy 8.29 forbids school personnel from using corporal punishment, or “unwarranted excessive force,” on students. The Employee Handbook adds that “employees may use reasonable physical force against a student to prevent harm to self or others,” but “such force may only be used when other means of intervention are ineffective.” Further, Administrative Policy 6.07(2)(n) prohibits – in pertinent part – interfering with, coercing, or injuring students.

It is uncontested that on April 5, 2022, A appeared in teacher S.M.’s classroom, distraught, with three scratches on his neck. The photographs taken at the time show three livid, finger-shaped scratches along his neck, one of which drew blood. Given the angle, it is extremely improbable that A inflicted these scratches on himself.

Three witnesses – J.K., S.M., and A.H. – agree that when G.T. arrived in S.M.’s classroom shortly after A, she admitted that the scratches on A’s neck were from her “tussling” with A.

G.T. later insisted that by “tussling,” she meant corralling A before he went down the stairs, thereby preventing him from hurting himself. However, the security footage and the testimony of G.T.’s coworkers corroborate the disturbing statements that K.J. reported G.T. making on April 6, 2022: that G.T. injured a special needs student while concealing her actions from security cameras.

The security footage first shows A heading down a hallway by himself. G.T. runs after him, stops A by physically blocking him, then takes his arm and guides him back in the other direction. Although assistant principal J.K. testified that children’s health assistants are supposed to follow at a distance and call school safety for assistance, G.T. testified that she was trying to prevent A from injuring himself while going down the stairs. This falls under the Administrative Policy’s exception for using reasonable physical force to prevent students from injuring themselves. Since G.T. never reaches in the vicinity of A’s neck, the scratches on his neck could not have come from this interaction.

However, the security footage continues to show roughly ten minutes in which G.T. and A were in some sort of altercation outside the view of the security cameras. In the security footage, G.T. appears to be forcing A into a blind spot behind the stairs. Her actions make little sense if she was truly trying to get A back to his classroom.

G.T. can be seen repeatedly grabbing A’s arm and forcefully turning him around. Though G.T. claims A was kicking and acting violently, she admitted that she did not call a school safety officer because she didn’t “need security.” As mentioned previously, although G.T. claimed she

was unable to call security because she lost her walkie talkie, the footage shows her holding her walkie talkie after the altercation had begun and after it ended.

Further, G.T. did not present any evidence that, in this encounter, she was using reasonable physical force to prevent A from injuring himself or others. Since G.T. did not scratch A during the first encounter, she must have scratched and otherwise injured him during the encounter behind the stairs. From the location of the scratches near the back of A's neckline, it appears that G.T. attempted to grab A by his shirt – an entirely inappropriate way to restrain a child, even if they were in danger of injuring themselves or others. Assistant principal J.K. further testified that these marks could not have come from permitted contact. G.T. used unwarranted, excessive force on A, thereby injuring him, with no intention of preventing harm to A or others.

As mentioned previously, this is not the first time G.T. has been disciplined for using corporal punishment against a special needs child in her care. In 2021, she was moved to the middle school from the high school after slapping a special needs girl in the face, leaving welts.

Further, G.T.'s testimony betrayed a disturbing attitude towards the special needs students in her care. During the hearing, she repeatedly characterized the special needs students as difficult and violent. She blamed them for her physical injuries and compared them to animals. Her attitude was hostile and adversarial.

G.T. did not seem to understand that the special needs students she worked with have diminished moral and intellectual capacity, both because they are children and because they have intellectual disabilities. Although special needs students can exhibit challenging and even violent behavior, the aides entrusted with their care and wellbeing are required to demonstrate patience and forbearance rather than responding with violence. This expectation was clearly and consistently communicated to G.T. during her tenure at the MPS.

Deception & Lying

Administrative Policy 6.07(2)(b) prohibits falsification of any district documents or records by omission or commission.

Multiple witnesses provided credible and consistent testimony to prove that G.T. used corporal punishment against A on April 5, 2022. By conducting this prohibited conduct in an area outside the view of security cameras, thereby hiding it from the security footage, G.T. falsified school security footage, a district record.

The Merits

At her discharge meeting, G.T. was told she was terminated for the following conduct: (1) engaging in corporal punishment against a student; (2) confining her behavior to an area outside camera view to avoid getting caught; and (3) lying about the above when questioned about it. The preponderance of the evidence shows that G.T. committed the conduct for which discipline is warranted: namely, using corporal punishment against a special needs child in her care. Termination is consistent with the seriousness of this misconduct. The egregiousness of the

behavior, and the evidence that G.T. has used corporal punishment on a special needs student in the past, justifies a departure from progressive discipline.

For the reasons set forth above, I find the MPS's termination of G.T. was for just cause. Accordingly, I issue the following:

DECISION

G.T.'s termination was for just cause. Therefore, her termination stands, and her grievance is denied.

Issued at Madison, Wisconsin, this 15th day of March, 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Katherine B. Scott, Impartial Hearing Officer