

BEFORE THE IMPARTIAL HEARING OFFICER

In the Matter of the Grievance of

ELLIOT ISOM

Under the Grievance Procedure of

MILWAUKEE PUBLIC SCHOOLS

Case ID: 22.0074

Case Type: IHO

Grievance No. 23-084

DECISION NO. 39973

Appearances:

Attorney Will Kramer, Pines Bach LLP, 122 W. Washington Avenue, Suite 900, Madison, Wisconsin appearing of behalf of Elliot Isom.

Attorney Debra Rash, 5225 W. Vliet Street, Milwaukee, Wisconsin appearing on behalf of Milwaukee Public Schools.

DECISION OF THE IMPARTIAL HEARING OFFICER

I was selected by Milwaukee Public Schools (MPS) and assigned by the Wisconsin Employment Relations Commission to serve as an impartial hearing officer (IHO) as to a grievance filed by Elliot Isom. In his grievance, Isom asserted he had been suspended for three days and ordered to take additional training without just cause by MPS.

A hearing was held on September 20, 2023, at the MPS Administrative building located at 5225 West Vliet Street, Milwaukee, Wisconsin. A stenographic transcript of the hearing was prepared and provided to the IHO on October 9, 2023. Isom submitted a post-hearing brief on September 26, 2023. MPS submitted their response to Isom's brief on October 6, 2023.

The parties agree that the issue to be decided is:

Did MPS have just cause to issue discipline to Elliott Isom in the form of a three-day unpaid suspension, training requirement, and a letter in his personnel file; if not, what is the appropriate remedy?

The MPS created grievance procedure provides that it is MPS's burden to establish that just cause exists. While just cause is not defined in the procedure itself, prior IHO proceedings between the parties reflect the application of a conventional two step just cause analysis consisting of (1) did MPS establish that misconduct occurred and, if so (2) does the level of discipline imposed by MPS reflect the seriousness of misconduct. As to the level of discipline imposed, the MPS Employee Handbook provides in part:

[D]iscipline is progressive in nature and requires communication with employees Disciplinary action may include: written reprimand, suspension, demotion, or termination of employment. Specific disciplinary actions will depend on the behavior and frequency of occurrences.

Id., p.9.

All parties are in agreement of the following: Isom is a teaching assistant/paraprofessional with MPS and on December 8, 2022, was assisting in the management of a classroom of approximately fourteen students aged 8-9. At the time of the incident the students were exhibiting behavior challenges, including throwing crayons at one another, one student throwing a chair at Isom, another throwing a metal water bottle, and students wrestling with one another.

What happens next is a subject of dispute. According to Isom, after the wrestling incident, Isom used his arms as a barrier in order to diffuse the situation between the three students who were wrestling. Isom states that he never intentionally had any physical contact with the three students, instead trying to use the incident as a teaching moment and tried to get the students into the calming corner.

MPS relies upon the statements of the students present at the time of the incident. The only witness called by MPS was principal Tonya Love, who called in the students present and transcribed their version of events five days after the incident occurred. MPS's position is that Isom pushed the heads of the three students who were wrestling into a chalkboard and that those actions were unwarranted and excessive. MPS further argues that Isom acted in a threatening and unprofessional manner that was unwarranted which led to students crying and being afraid of him.

ISOM'S MOTION FOR SUMMARY DISPOSITION

When MPS rested from presenting their case in chief, Isom moved for Summary Disposition stating that MPS' case was based solely on uncorroborated hearsay and as such could not legally be the basis for a finding of fact and can not be the sole basis for a finding of wrongdoing.

I find that, specific to the charges against Isom and the age of the witnesses involved, that the evidence of their transcribed testimony, as testified to by Principal Love, will be allowed as a basis for evidence of the alleged conduct. As to any legal authority to prevent such, specifically *Gehin v. Wisconsin Group Ins. Board*, 278 Wis. 2d. 111 (2005), it is noted that this is not a

traditional court proceeding, a proceeding under Wis. Stat. § 227, or even an arbitration proceeding. And, importantly, the witnesses are children. The IHO proceeding is typically established with a less stringent procedural framework in mind and is a creation of management to work through disciplinary issues of employees while allowing an avenue for the employee to defend themselves. It seems very unlikely that the procedure MPS has unilaterally created would prohibit IHO consideration of hearsay evidence generally¹, and specifically in the manner it is being offered in this matter. As a general policy consideration, any other finding would open the door for teachers of younger children to have nearly unilateral carte blanche to behave in any manner they chose regardless of MPS policy when alone with their students, or in the alternative subjecting young children into an adversarial process being cross examined by attorneys, creating a practice under either path that leads to *reductio ab absurdum*.

DISCUSSION AND CONCLUSION

The dilemma before the IHO is, given the limited evidence and record presented: What really happened?

MPS provides transcribed statements of several students with different recollections of events that are sometimes conflicting with one another. The statements were made several days after the event occurred, leading to potential difficulties in the ability to accurately recollect the events of the day in question.

Isom argues convincingly that uncorroborated hearsay evidence should be weighed less than the direct testimony offered by Isom himself.

As stated earlier, MPS has the burden to establish the misconduct occurred. I find that, given the several statements given by the students at hand, there is enough cohesion of theme in the statements to make a finding that some misconduct occurred.² Supportive of this is Isom's own testimony which I do not find to be wholly credible. Isom certainly is guided by self-interest, but with his testimony lacking any serious acknowledgement of the actions alleged, even with a justification provided, is so at odds with those of the multiple students to be found suspect.

However, under that same just cause analysis stated prior, MPS also has the burden to establish the seriousness of the misconduct in order to support the level of discipline imposed. In

¹ Isom correctly points out that the Employee Handbook is silent as to whether the rules of evidence apply, what the standard of evidence is, and only gives guidance as to a "just cause" determination be made as to the employee's actions and the discipline that follows. This silence allows some degree of latitude to the IHO in determining issues of admissibility.

² The statements of the students are wildly varied. The description of events is not consistent and at times in conflict with one another, specific to the actions of mannerisms and physical actions of Isom, the students affected, and how events occurred. It is highlighted, in case it isn't obvious to the reader, that these are children between the ages of 8 and 9 years old who are being asked to recollect events five days after they happened. While their stories are divergent in specificity as one would expect from children of that age, they share the over-riding theme that something happened that should not have and that Isom's behavior was inappropriate.

this matter MPS skipped a level of progressive discipline, going from a prior Letter of Expectation up to a three-day suspension without pay, skipping a one-day suspension. Isom is correct in his assertion that the uncorroborated hearsay has a lesser prohibitive value for a decision maker. Given the sometimes contradictory statements of the students, and absent the ability for corroborative testimony or evidence outside of the student statements, it's very difficult for the IHO to reach a finding reflective of the degree of seriousness as to the actions of Isom. Did Isom do something that day that was in violation of his duties and expectations as an MPS employee? Yes, the evidence is sufficient to demonstrate that. But the weight of evidence is lacking as to the extent of that violation, the degree of force used, or other factors that would be supportive of skipping a level of progressive discipline.

Given the foregoing, I conclude that MPS had just cause to suspend Isom for one day with a letter reflecting such put in his personnel file and require that Isom complete the CPI Nonviolent Crisis Intervention Foundations Course through LMS. Isom shall be made whole in all other respects due to the modification of discipline determined in this decision.

Issued at Madison, Wisconsin, this 20th day of October 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Impartial Hearing Officer