

**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

Sean E. Garnett,

Appellant,

v.

Case No. 2015-REM-11-0226

Scioto County Board of Developmental Disabilities,

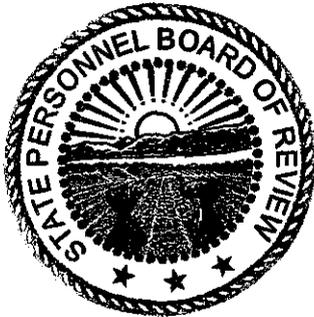
Appellee,

ORDER

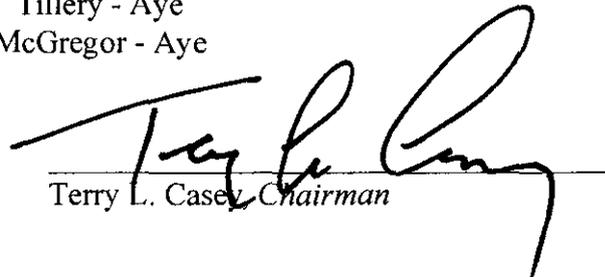
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that Appellant's **REMOVAL** from the position of Educational Aide is **AFFIRMED**, pursuant to R.C. 124.03 and R.C. 124.34.



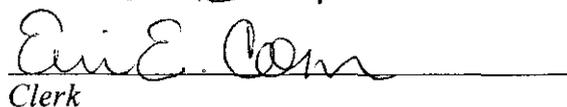
Casey - Aye
Tillery - Aye
McGregor - Aye


Terry L. Casey, *Chairman*

CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes ~~(the original)~~ a true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, June 09, 2016.


Clerk

NOTE: Please see the reverse side of this Order or the attachment to this Order for information regarding your appeal rights.

NOTICE

Where applicable, this Order may be appealed under the provisions of Chapters 124 and 119 of Ohio Revised Code. An original written Notice of Appeal or a copy of your Notice of Appeal setting forth the Order appealed from and the grounds of appeal must be filed with this Board fifteen (15) days after the mailing of this Notice. Additionally, an original written Notice of Appeal or a copy of your Notice of Appeal must be filed with the appropriate court within fifteen (15) days after the mailing of this Notice. At the time of filing the Notice of Appeal or copy of your Notice of Appeal with this Board, the party appealing must provide a security deposit to the Board. In accordance with administrative rule 124-15-08 of the Ohio Administrative Code, the amount of deposit is based on the length of the digital recording of your hearing and the costs incurred by the Board in certifying your case to court. The length of the digital recording, the costs incurred, the corresponding amount of deposit required, and the final date that the Notice of Appeal or copy of your Notice of Appeal and the Deposit will be accepted by this Board are listed at the bottom of this Notice. If a full or partial transcript of the digital recording has been prepared prior to the filing of an appeal, the costs of a copy of that certified transcript will be accepted by this Board; transcript costs will be listed at the bottom of this Notice.

IF YOU ELECT TO APPEAL THIS BOARD'S FINAL ORDER, THEN YOU MUST PROVIDE THE DEPOSIT LISTED BELOW AT THE TIME YOU FILE YOUR NOTICE OF APPEAL OR COPY OF YOUR NOTICE OF APPEAL WITH THIS BOARD. Please note that the law provides that you have fifteen (15) calendar days from the mailing of the final Board Order to file your Notice of Appeal or copy of your Notice of Appeal both with this Board and with the Court of Common Pleas. The fifteenth day is the date that appears at the bottom of this Notice.

METHOD OF PAYMENT: for all entities other than State agencies, payment of the deposit must be by money order, certified check, or cashier's check. State agencies are required to use the Intra-State Transfer Voucher (ISTV) system (OBM Form 7205), which must be processed prior to the filing of an appeal. To initiate an ISTV, State agencies may call the State Personnel Board of Review Fiscal Office at 614/466-7046.

IF YOU MAINTAIN YOU CANNOT AFFORD TO PAY THE DEPOSIT LISTED BELOW, THEN YOU MUST COMPLETE THE BOARD'S "AFFIDAVIT OF INDIGENCE" FORM. YOU CAN OBTAIN THAT FORM BY CALLING 614/466-7046. THE COMPLETED AFFIDAVIT MUST BE RECEIVED BY THIS BOARD ON OR BEFORE June 16, 2016. You will be notified in writing of the Board's determination. If the Board determines you are indigent, you will be relieved of the responsibility to pay the deposit to the Board. However, if the Board determines you are NOT indigent, then YOU MUST FILE YOUR NOTICE OF APPEAL OR A COPY OF YOUR NOTICE OF APPEAL AND PAY THE DEPOSIT BY THE DATE LISTED BELOW.

If you have any questions regarding this notice, please contact the Board at 614/466-7046.

Case Number: 2015-REM-11-0226

Transcript Costs: \$459.00 Administrative Costs: \$25.00

Total Deposit Required: * \$484.00

Notice of Appeal and Deposit Must
Be Received by SPBR on or Before: June 24, 2016

**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

Sean E. Garnett

Case No. 2015-REM-11-0226

Appellant

v.

May 12, 2016

Scioto County Board of
Developmental Disabilities

Appellee

James R. Sprague
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came to be heard on record hearing on March 7, 2016. Appellant, Sean Garnett, appeared *pro se*. Stephen P. Postalakis, Attorney at Law, appeared on behalf of Appellee, Scioto Board of Developmental Disabilities (SCDD).

This cause came on pursuant to Appellant's timely appeal of his removal from his position of Educational Aide, effective November 20, 2015. Appellant received the applicable R.C. 124.34 Order the same day.

Jurisdiction over the subject matter of this appeal was established pursuant to R.C. 124.03 and R.C. 124.34.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

The R.C. 124.34 order states in pertinent part: "Misfeasance, Malfeasance, Major Unusual Incident (MUI) for physical abuse."

At hearing seven witnesses testified:

First, Appellee called John Harris who is the crisis response trainer and co-developer of the affected student's Personal Support Plan (PSP).

Next, Appellee called Connie Cline, a student, and witness to the event.

Next, Appellee called Kathy Sharp, Investigator for the Appellee.

Next, Appellee called Stardust White, the mother of the affected student.

Next, Appellee called Matt Purcell, the pre-disciplinary conference administrator.

Lastly, Appellee called Julie Monroe, Appellee's Superintendent.

Appellant, Shawn Garnett, testified in narrative form.

At all times relevant, Appellant was an Educational Aide working with developmentally disabled children and adults for Appellee.

Appellant was removed for allegedly physically abusing a student by way of improperly restraining him. The event occurred on a school bus on or about September 3, 2015 and lasted intermittently for about an hour. Appellant self-reported the event by making an incident report about a possible major unusual incident ("MUI") to his superior.

MUI is generally defined in O.A.C. 5123:2-17-02 (15):

"Major unusual incident" means the alleged, suspected, or actual occurrence of **an incident when there is reason to believe the health or welfare of an individual may be adversely affected or an individual may be placed at a likely risk of harm**, if such individual is receiving services through the developmental disabilities service delivery system or will be receiving such services as a result of the incident. There are three categories of major unusual incidents that correspond to three administrative investigation procedures delineated in appendix A, appendix B, and appendix C to this rule: (emphasis added)

O.A.C. 5123:2-17-02 (15) (c) (ii) defines the pertinent Category C as follows:

(ii) Unapproved behavior support. "Unapproved behavior support" **means the use of an aversive strategy or intervention prohibited** by paragraph (J) of rule 5123:2-1-02 of the Administrative Code **or an aversive strategy implemented without approval** by the human rights committee or behavior support committee or without informed consent, **that results in a likely risk to the individual's health and welfare**. An

aversive strategy or intervention prohibited by paragraph (J) of rule 5123:2-1-02 of the Administrative Code that does not pose a likely risk to health and welfare shall be investigated as an unusual incident. (emphasis added)

These regulations flatly prohibit use of some types of restraints. They also restrict usage of any restraint not contained within the client's behavioral support plan. The behavioral support plan, also known as the PSP or personal support plan, is an individualized plan with the goal "to provide staff with guidance for the development of proactive strategies..." in the care of service recipients. (Exhibit 12 at page 1).

The student's PSP contains a section on approved "reactive strategies" which permit intermittent "5 second hands down" with hands open, one person escort (a.k.a. PACES), and open handed blocking techniques in order to keep the student safe. The only other approved physical restraint is for use in the classroom. It is used solely to stop rectal digging and involves gently pushing the student's chair with him in it up against his table. This restraint can only be used for one minute at a time.

The PSP does not specifically address time spent in transport on the school bus. However, trainer and PSP developer John Harris testified that all staff, including Appellant, are trained on and must adhere to the "Positive Behavioral Supports and Crisis Intervention Manual" (PBSCIM) phonetically referred to as "pa-bisci" for short. The PBSCIM categorizes undesired behaviors into levels and defines the appropriate corresponding permissible "aversive" (involuntary) interventions.

The PBSCIM, at Level IV--Acting Out, includes self-injurious, overtly threatening, physically violent (grabs at, punches, pulls hair, et cetera) and breaking property behaviors. The authorized staff response is limited to block, redirect, release, assuming a protective posture, and defensive interventions only. It also counsels waiting for help whenever possible. (PBSCIM at p. 7)

In this case, testimony and video evidence conclusively establish that Appellant employed physical restraints which (went well beyond) transcended the student's PSP and the PBSCIM. Specifically, Appellant is apparently seen leaning on the student for many seconds and sometimes minutes. Appellant is also apparently seen taking student to the floor of the bus, and restraining him for more than five seconds at a time in violation of the student's PSP. Furthermore, the technique observed does not fall within "blocking" but is more akin to a pinning maneuver.

There are numerous other incidences on the videos where Appellant does not follow the PBSCIM. This includes when Appellant is hovering over and sitting on or next to the student.

The PBSCIM focuses on avoiding physical interventions, using the minimum amount of force, and allowing a way out for the student, whenever practicable. Witness John Harris repeatedly distilled PBSCIM into giving the student "time and space" wherever possible to calm down.

We have established that the interventions employed by Appellant against the student violated the PSP and the PBSCIM. Thus, we must next examine whether Appellant's intervention violated Appellee's work rules.

Investigator Kathy Sharp testified that she had probable cause to believe the force used constituted abuse because it placed the student at serious risk of harm or injury. During her preliminary inquiry, she brought in the Sherriff to lead the investigation.

Investigator Sharp noted that if Appellant's use of the physical restraint was held to constitute abuse, it may also constitute a criminal offense. She stated she deferred to law enforcement to head the investigation and conduct certain interviews. There is no evidence in the record that Appellant was ever criminally charged.

Superintendent Julie Munroe testified that she her decision to terminate Appellant was guided by the work rules regarding abuse and safety. She stated she was compelled to choose the most stringent discipline of termination, due to the fact that Appellant's actions placed the student at serious risk of harm. She noted that the event took place in spite of the fact that Appellant was trained four times on proper crisis procedures.

Appellee's work rules define Level 1 offenses as those which "are of a very serious and possibly criminal in nature." (Exhibit 5 at the 4th page) The range of discipline contemplated for a Level 1 offense is a suspension of up to 30 days to termination. (Id.)

Examples of Level 1 offenses include: "...3. ...any act of violence...4. abusing...or assaulting a service recipient...16...physical abuse of a service recipient...and, 18...working in an unsafe manner that endangers service recipients"

CONCLUSIONS OF LAW

Distilled to its basics, this case presents the question of whether Appellant's interventions constitute an act of violence, constitute an act of physical abuse or assault, and/or constitute working in an unsafe manner within the meaning of Appellee's work rules?

Yes, Appellant's actions violate Appellee's work rules concerning physical abuse and safety.

Merriam Webster online dictionary¹ defines violence as, "the use of physical force to harm someone, to damage property, etc." It further defines abuse as "physical maltreatment" and assault as "a physical attack." (NOTE: I do not use the legal definitions of these various terms due to the fact that there is no indication in the record of a criminal conviction or the bringing of criminal charges.)

Merriam's definition of violence implies an intention to harm. Appellant's testimony disclaims any such intention. So too, the investigator and superintendent's testimony indicate that Appellant's actions may have placed the student at serious risk of physical harm. Yet, their testimony appears to fall short of stating that Appellant wanted to harm the student.

The record conclusively establishes that the student was subjected to physical maltreatment because Appellant's interventions were contrary to the Ohio Administrative Code, the PBSCIM, and the PSP. Correspondingly, this constitutes malfeasance which according to *Black's Law Dictionary*, Deluxe 6th Edition, Centennial Edition 1991, (page 956) is "... a wrongful act which the actor has no legal right to do..."

This conduct also simultaneously constitutes misfeasance, which is the "improper performance of some act..." *Id at page 1000*. Here, Appellant undertook his duties, but did not competently discharge them when he used an authoritarian and commanding tone with the student while engaging him closer; instead of following the PSP by disengaging and providing space and time.

Appellant more or less argues that he did use the least amount of force possible because the student was banging his head against the window and was therefore self-injurious. He is sorry about the situation and that this crisis situation was unique because the student is so challenging. He did not want anyone to get hurt including the bus driver, other students, and himself.

¹ <http://www.merriam-webster.com/> (May 2, 2016)

Appellant notes that the student has injured others, and implies that he would not be called upon to defend his actions if the student had hurt him instead. Appellant states he did what he thought was right to keep everyone safe.

Appellant states he wanted to keep the student from "running around" and offered that the student will "hit and kick you." He notes that he asked for help at the beginning of the year with the student and would have loved to have had a second aide to help him, but a second aide was not utilized until after he was terminated.

At one point earlier in the hearing, Appellant cross-examined witness John Harris by asking, "What would you have done differently?" implicitly maintaining that restraining the student was the best way to prevent self-harm.

However, Appellant never used the less invasive PACES escort technique to move the student to a location where he was not as able to harm himself. Instead, he just held him down and even wrestled him to the floor. At many points from the videos, one does not observe intermittent application of restraint but rather a continuous hold down.

Admittedly, Appellant's actions may seem logical and warranted to a layperson. After all, does holding a self-injurious person down place that person in greater risk of serious physical harm than doing nothing? Would it not be more appropriate for Appellee to recognize Appellant for trying so hard to contain a tough situation?

The videos show that Appellant has one foot on the ground and one leg in the bus seat with the student also in the bus seat. This suggests, but does not conclusively show, that Appellant's other leg is pinning the student in place.

Perhaps this was indicative that Appellant was applying measured force and avoided placing his full weight on the student. (Note: Appellant maintains that the student fell on him and that he did not put his knee on the student.)

After all, there is not a lot of room on the bus. Appellant noted "[The student] was on the verge of pulling [the other aide's] hair out. I did the best that I could do."

I agree that Appellant was not trying to hurt the student and that this crisis situation was very challenging. However, this line of argument which Appellant asks us to accept must be rejected. This is because it ignores the informed application of policy, the mandate of regulation, and the wisdom of professional learning about people with special needs.

It was not Appellant's job to apply his version of common sense, but to apply his training instead. He did not apply his training, and the result is the MUI we have examined, herein.

I do not reach a conclusion about the actual psychological or physical harm that the student may have experienced as a result of Appellant's actions. Unquestionably, the student's mother testified with bravery, passion, and candor about the student's numerous, challenging behavioral and medical conditions both pre- and post-incident. However, the record does not contain (nor, in this case, does it need to contain) expert testimony to establish with a reasonable degree of medical or psychological certainty which of these conditions may or may not have been proximately caused by Appellant in order to sustain the removal.

I find that Superintendent Munroe's decision to remove Appellant was reasonable and prudent under the circumstances. Appellant's conduct violated Appellee's work rules regarding abuse and safety of service recipients. Moreover, the record shows Appellant was professionally trained on the PBSCIM, was professionally trained and re-trained on the student's PSP, and was on constructive notice regarding the pertinent mandates set forth in the Ohio Administrative Code.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **AFFIRM** Appellant's **REMOVAL** from the position of Educational Aide, pursuant to R.C. 124.03 and R.C. 124.34.



James R. Sprague
Administrative Law Judge