

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for substantive challenge to the decision.

**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)
In the Matter of:	)
	) OEA Matter No. 1601-0104-09
RALPH WARE	)
Employee	) Date of Issuance: March 30, 2010
	)
v.	) Sheryl Sears, Esq.
	) Administrative Judge
DC PUBLIC SCHOOLS	)
Agency	)
_____	)

Ralph Ware, *Pro Se*  
Frank F. McDougald, Esq., Agency Representative

**INITIAL DECISION**

INTRODUCTION

Ralph Ware (“Employee”) was a Bus Attendant with the Department of Transportation of DC Public Schools (“DCPS” or “Agency”). On March 10, 2009, a letter issued from the Office of the Transportation Administrator notified Employee of a proposal to remove him for committing an act of “corporal punishment.” Agency alleged that, on February 26, 2009, Employee grabbed a student.

The letter cited eyewitness accounts and a video tape of Employee’s actions and asserted that, during a meeting with Employee and his union representatives, Employee admitted the behavior to Agency officials. Employee was notified that he had the right to an administrative review if he submitted an appeal within six (6) calendar days. There is no record of an administrative review. Employee was notified that the removal action would be effective on March 26, 2009.

On March 18, 2009, Employee filed an appeal. Although it was premature, the removal action was effected. Therefore, the appeal was accepted. Employee denies the charge as follows, “I remember touching student but not grabbing or hitting student.” He

challenges the decision to remove him as too harsh in view of his work history at the agency. Employee seeks reinstatement, back pay and any missed salary increases.

The parties convened on January 6, 2010, for a pre-hearing conference. An evidentiary hearing was held on March 10, 2010.

### JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

### ISSUES

Whether Employee committed acts constituting corporal punishment.

If so, whether Agency abused its discretion by removing Employee.

### BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that “[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction.” In accordance with OEA Rule 629.1, *id.*, the applicable standard of proof is by a “preponderance of the evidence.” OEA Rule 629.1 defines a preponderance of the evidence as “[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.” Agency has the burden of proving, by a preponderance of the evidence, that Employee committed acts constituting legal cause to remove him.

### POSITIONS OF THE PARTIES

Agency maintains a “zero tolerance” policy against corporal punishment by employees against students. Agency contends that, no matter what the level of intensity of Employee’s actions, the touching of a student as alleged was prohibited and good cause for removal. Employee maintains that he did not touch the student harmfully and should not be punished.

### FINDINGS OF FACT

#### **Summary of Testimony of Agency’s Witness**

Kyle R. Cochran, Senior Investigator, Department of Transportation, DC Public Schools

Cochran, a former Police Investigator, now serves as a Senior Investigator for the agency and supervises eight (8) employees. His unit investigates bus ride times, collisions and complaints of unprofessional conduct. Inquiries come from parents, members of the public and school officials.

Cochran described the duties of the Bus Attendants. They accompany children with special needs (a physical or emotional disability) while the bus is in motion. They also get off at students' homes to receive and escort them to the bus. Once at the school, they escort them to the building. Sometimes, they are required to sign a student in. In the afternoon, they escort the children back to the bus and from the bus to their home.

Cochran came to know Employee while conducting an investigation in February of 2009, of the charge "that Mr. Ware had grabbed a student by his clothing, dragged him out of one room and then grabbed him by the front of his jacket and held him against a wall in a hallway." (*Transcript, Page 7, Lines 11 - 14*). The complaint was presented to Cochran by the parent of the male student. Because she knew Cochran from his work on her earlier complaint, she contacted him directly.

She called me via telephone at my direct line at my desk and she reported to me -- she was very upset and she said that her child, [D.], had told her that the bus attendant had stepped on his feet and choked him and she wanted to speak to me, she wanted me to investigate what had taken place, and she was on her way down to the school [Malcolm X Elementary] to go see her child. (*Transcript, Page 13, Lines 11 - 17*).

On February 27, 2009, the day after the alleged incident, Cochran interviewed the student, an eight (8) year old who is mentally challenged. He asked him a few questions and the young man began to cry. The student said that the Bus Attendant was upset with him for stomping his feet and running when he got off of the bus. Ms. Jenkins, the Assistant Principal of the school presented Cochran with a videotape of part of the incident. The videotape was not available for the hearing. Cochran explained that the real time footage of the incident is controlled by DC Public School Security, a separate entity.

A series of stills taken from that footage was presented as evidence at the hearing. While referring to those, Cochran described what he saw when he watched the videotape:

So the video showed Mr. Ware walk into the cafeteria from one side, he walked over to where [D.] was standing. He said something to him and then he put his hand on the back of his neck, kind of in a grabbing motion, and then he began to walk Damarcus towards the opposite side of the cafeteria. In the video, it was clear to me that Damarcus had put his feet out to kind of brace himself from moving forward and he was struggling to get away from Mr. Ware at that time.

And I am a hundred percent positive that that's the way of taking -- of the way that he was grabbing him and that [D.] was struggling. Because I have had to escort people who

didn't want to go places themselves out of places and it was, you know, picture perfect; he was trying to go in one direction, Mr. Ware was walking in the other.

[D.], just so you have an idea, was probably four and a half feet tall and maybe 60 pounds, so there is a clear height disadvantage and a weight disadvantage. So although he was resisting, it wasn't to much avail. Mr. Ware then walked him from this side of the cafeteria to the opposite side where he had entered and out into the hallway. In the lower portion of the video, there's a number of tables where the students were sitting, eating their breakfast, because this school happens to offer breakfast prior to the day starting.

And when Mr. Ware initially came in, the students weren't paying attention, but as he walked him across the cafeteria, all of the students that were sitting at the seats, their attention was on what was going on, and you can see in the video that they were following the events from one side to the other as he escorted him out. (*Transcript, Page 19, Lines 20 – 22 and Page 20, Lines 1 – 22 and Page 21, Lines 1 - 11* ).

Cochran said that he also interviewed two students. Ms. Moon, a teacher who was standing in the cafeteria reported to Cochran that she saw through a window, a part of the event that occurred outside of the view of the cameras. She told Cochran that, after Employee escorted the student into the hallway “[s]he observed Mr. Ware with his hand on Damarcus’ jacket and holding him against the wall and yelling at him.” (*Transcript, Page 23 , Lines 9 - 11* ). She was not present as a witness at the hearing.

According to Cochran, there was no reason for Employee to be in the cafeteria or with the student. He said that, if Employee observed misbehavior by the student once he arrived at the school, he should have documented and reported it and presented it in an incident report. That would have been forwarded for investigation. Cochran discussed the agency’s zero tolerance policy against corporal punishment by teachers, bus drivers and all other employees.

### **Summary of Testimony of Employee’s Witness**

#### **Ralph Ware, Bus Attendant**

Employee testified on his own behalf. He explained that he went into the school, as he customarily did, to use the bathroom. It is next to the cafeteria. Instead, when he saw the student run, Employee followed him:

[H]e was sitting down, eating, getting ready to eat. So I spoke to him and I told him that, "You know, I told you, you know, for your own safety, please don't run in the hall." So I told him, I said, "This is what I'm going to do. I'm going to go ahead and make you do this over again." And I escorted him from the cafeteria to the front of the school, so I made him rewalk that, yes, I did, for his own safety. I didn't want him to hurt himself, so you know, I just wanted him to listen to what I had to say, you know. So we rewalked it and before we got out of the cafeteria, he had a little tantrum. (*Transcript, Page 71 , Lines 12 - 22 and Page 72, Lines 1 - 5* ).

The student started stomping his feet and Employee tried to talk him down. But the student went back into the cafeteria and threw his milk.

Employee countered the version of events presented by Cochran.

I was just escorting him out of the cafeteria, making him walk over again. I didn't draw attention like that; he said I did. He said that the student resisted me. That's not true. He might have been mad at me, but he walked with me. So like I said, once we got out of the cafeteria, I made him do it all over again, but I didn't -- I wasn't aggressive. I just wanted him to be safe, just do the right things, that's all I wanted. I wouldn't -- I mean I wasn't mean or anything to him. I just didn't want him to get hurt, Your Honor.

I have seen kids get hurt in the hallways from not doing what people tell them to do. I wasn't aggressive, I didn't hit him, I didn't grab him, I didn't cuss at him. I didn't do none of those things, I just talked to him. (*Transcript, Page 73 , Lines 14 – 22 and Page 74, Lines 1-2*).

## **Findings**

The following regulations apply to the use of corporal punishment by employees of the D.C. Public Schools (Source: Final Rulemaking published at 24 DCR 1005, 1039 (July 29, 1977); as amended by Final Rulemaking published at 35 DCR 6013 (August 5, 1988) and by 49 DCR 3485. 3485-86 (April 12, 2002)).

### **2403 CORPORAL PUNISHMENT**

2403.1 For purposes of this section, "corporal punishment" is defined as the use, or attempted use, of physical force upon, or against, a student, either intentionally or with

reckless disregard for the student's safety, as a punishment, or discipline.

2403.2 The use of corporal punishment in any form is strictly prohibited in and during all aspects of the public school environment or school activities. No student shall be subject to the infliction of corporal punishment by any teacher, other student administrator, or other school personnel.

2403.3 No teacher, administrator, student or other person shall subject a student to corporal punishment or condone the use of corporal punishment by any person under his or her supervision or control.

2403.4 Permission to administer corporal punishment shall not be sought or accepted from any parent, guardian, or school official.

2403.5 Conduct prohibited by this section include actual or attempted use or physical force against a student in accordance with § 2403.1, provided that the conduct is not prompted by reasonable efforts at self defense or the defense of others; is necessary to maintain or regain order; or is necessary for the safety of the educational environment. Examples of prohibited conduct include, but are not limited to, the following:

- (a) Shoving;
- (b) Striking;
- (c) Grabbing;
- (d) Shaking;
- (e) Hitting;
- (f) Throwing of objects; and
- (g) Unreasonable restraint.
- (h) Directing others to inflict any of the above on a student.

2403.6 The nature and the amount of physical contact reasonably necessary for self-defense, defense of others,

protection of the educational environment, or to regain or maintain order shall be dependent upon the factual circumstances of each case. When reviewing those circumstances, the following shall be considered:

(a) If the action was taken in self-defense or the defense of others, whether the action taken against the student was (1) proportionate to student's conduct, and (2) the least intrusive means of controlling the situation.

(b) If the action was taken against a student for the protection of the educational environment or regain or to maintain order, whether the action taken against the student was (1) taken as a last resort after all other reasonable means had been exhausted, and (2) the least intrusive means of controlling the situation.

2403.7 All allegation of the use of corporal punishment shall be promptly investigated. Discipline shall be administered against any employee who violates this section. Students shall be permitted, but not required, to testify at any proceeding relating to the allegation of corporal punishment.

2403.8 Employees found to have violated this provision will be subject to discipline in accordance with § 1401 of these Board Rules, 5 DCMR 1401, and the appropriate collective bargaining agreement, if applicable.

There is no dispute that Employee acted in an effort to discipline the student. The question, however, is whether the evidence supports a finding that, in doing so, he used physical force with reckless disregard for him. Investigator Cochran testified with clear recollection that, based upon his observation of Employee in the video recording, he used excessive force. However, Employee, while acknowledging that he approached the student and directed him to walk the path into the school again in a more appropriate manner than the first time, denies this.

Unfortunately, only still photos taken from the recording were available as evidence in this appeal. It was not entirely possible to determine the level of physical tension that was present between Employee and the student during the incident. The student's stance can easily be explained by the fact that the student did not want to be disciplined or scolded for his behavior. No child does. And Ms Moon, the Teacher who allegedly saw Employee with the student in the hallway up against the wall, was not present at the hearing. Nor is there any visual evidence of the events that she claims to have seen.

The strongest evidence, and therefore, the evidence that will be accorded the most weight is Employee's credible testimony that he was not aggressive or violent with the student. Employee is the only witness who was present and a participant in the events in question. And although he may have overstepped the bounds of his professional duties by attempting to correct the behavior of the student, he did not inflict the kind of harm that is comprehended by the above provisions. In fact, in accordance with 2306 (b) of the above provision on corporal punishment, it seems that Employee's action "was taken against a student for the protection of the educational environment or regain or to maintain order" and was "the least intrusive means of controlling the situation." This Judge finds, as a fact, that Employee did not commit acts constituting corporal punishment.

### ANALYSIS AND CONCLUSIONS

Because Agency did not meet the burden of proving that Employee committed the behavior that was the basis of the removal, the penalty of removal must be reversed.

### ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of removing the Employee from service is REVERSED; and
2. The Agency shall reinstate the Employee to his last position of record; and
3. The Agency shall reimburse the Employee all back-pay and benefits lost as a result of his removal; and
4. The Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

---

SHERYL SEARS, ESQ.  
ADMINISTRATIVE JUDGE