

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-8-07

(UNFAIR LABOR PRACTICE)

OREGON EDUCATION ASSOCIATION,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSION OF LAW
WILLAMETTE EDUCATION SERVICE	)	AND ORDER
DISTRICT,	)	
	)	
Respondent.	)	
_____	)	

This Board heard oral argument on March 5, 2008, on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) Larry L. Witherell on January 11, 2008, following a hearing held before ALJ B. Carlton Grew on September 11 and 12, 2007, in Salem, Oregon. The record closed with the submission of post-hearing briefs on October 12, 2007.

Monica A. Smith, Attorney at Law, Smith, Diamond, & Olney, 1500 N.E. Irving, Suite 370, Portland, Oregon 97232-4207, represented Complainant.

Mark B. Comstock, Attorney at Law, Garrett, Hemann, & Robertson, P O. Box 749, Salem, Oregon 97308-0749, represented Respondent.

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On March 12, 2007, the Oregon Education Association (OEA) filed this unfair labor practice complaint against the Willamette Education Service District (District). The complaint alleged that the District unilaterally changed the *status quo* in violation of ORS 243.672(1)(e) by dismissing Jane Sesser in a manner inconsistent with

the discipline provisions, and the complaint provisions in the expired collective bargaining agreement.<sup>1</sup>

The issue in this case is:

Did the District unilaterally change the status quo in violation of ORS 243.672(1)(e) when it dismissed Jane Sesser on December 12, 2006?

### RULINGS

The rulings of the ALJ have been reviewed and are correct.

### FINDINGS OF FACT

1. The District is a public employer. The District provides services to school districts within Polk, Marion, and Yamhill counties, including services for special needs students. At the time of the hearing, the District employed about 220 licensed or certificated employees, such as teachers and other professionals, and about 230 classified employees, such as instructional assistants.

2. OEA and the Oregon School Employees Association (OSEA) are labor organizations. In 2003, OSEA became the exclusive bargaining representative for a wall-to-wall unit of all District classified and licensed employees. OSEA and the District negotiated and agreed to a collective bargaining agreement in effect from July 1, 2003 through June 30, 2006.

3. On February 5, 2007, OEA was certified as the exclusive bargaining representative for a unit of all academically licensed District employees. The unlicensed and non-academically licensed employees continued to be represented by OSEA.

4. On the date the record in this case closed, OEA and the District had not yet negotiated a successor to the expired collective bargaining agreement.

5. Article 7, Section 9.01 of the 2003-2006 expired collective bargaining agreement between OSEA and the District provided:

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<sup>1</sup>Prior to the hearing, the Complainant withdrew the allegations regarding violation of the notice of complaint provisions in Article 10 of the collective bargaining agreement.

“The DISTRICT will use due process and progressive discipline when disciplining or dismissing employees. An investigation, taking the accused employee’s version of the facts into account, shall be conducted regarding any charges or allegations. The employee will be given notice of the charges and will be given the opportunity to meet with his/her supervisor or designee to respond to the charges before discipline is administered. The employee’s past record shall be considered in determining the discipline. Disciplinary action shall be in proportion to the seriousness of the employee’s offense.”

6. Jane Sesser worked as a medical technologist from 1981 to 2002. She then completed a master’s degree in special education in August 2005 and took classes in classroom management as part of her master’s program. During the 2003-2004 school year, Sesser worked as a special education assistant in Gaffney Lane Elementary, Oregon City, Oregon, where she worked with Attention Deficit Hyperactivity Disorder (ADHD), autistic, developmentally delayed, and physically delayed students in kindergarten, first grade, and second grade. During the 2004-2005 school year, Sesser worked at Indian Hills Elementary, Aloha, Oregon, as a special education teacher in the education resource center, and worked with 25-30 special needs students. She wrote individualized educational programs (IEPs); assessed students; coordinated seven instructional assistants; and taught reading, writing, and mathematics in the resource center. Sesser received her Oregon teaching license in special education in August 2005.

Sesser is the mother of two special needs children. One is autistic, but is considered high functioning; the other was born without legs and uses a wheelchair. As a parent, Sesser is very involved with her children’s education.

7. Shortly before the beginning of the 2005-2006 school year, Sesser applied for a position as a middle school special education teacher with the District. The position had been filled by the time Sesser submitted her application. Because the District had an unexpected vacancy for a licensed teacher in its Life Skills Program at Amity Elementary School, it considered Sesser for that job. The District’s Life Skills Program in Yamhill County serves approximately 90 students with cognitive, physical, and emotional disabilities at secondary, middle, and elementary schools throughout the county. Students in the Life Skills Program receive training, instruction, physical and occupational therapies, and other services.

8. On August 29, 2005, Vern Barkell, District Assistant Director, and Kristina Sheppard, District Early Childhood Services Coordinator, interviewed Sesser for the position in the Life Skills Program at Amity Elementary School. During the interview, Sheppard and Barkell explained to Sesser that the job involved work with high-needs students and that some of the students were autistic. Sheppard also discussed two students, Student No. 2 and John Doe,<sup>2</sup> who were particularly difficult. Sesser told Barkell and Sheppard that she had never worked with students comparable to those in the Life Skills Program. Sheppard and Barkell told Sesser that she would have assistance and resources to help her if the District hired her.

After interviewing Sesser and reviewing her resume, Barkell and Sheppard concluded that Sesser, though inexperienced, would be able to perform the duties of the Life Skills position and offered her the job. Sesser accepted the position and began work on September 1, 2005, three days after the start of the work year for licensed District employees.

9. After she began working for the District, Sesser was told that the “Employee Handbook” was available on-line. The “Employee Handbook” contained a number of District policies but none related to the use of physical force with students. Additional District policies were available on the District’s website; Sesser knew that these policies were available. Among the policies available on the District’s website but not included in the “Employee Handbook” was Policy JGAA, which provided in pertinent part:

“It shall be the policy of the ESD that employees may use physical force to restrain a student when such student’s actions create a danger to other persons, property, or themselves. Physical force shall not be used to discipline or punish a student. Physical force is defined as ‘any force a person uses against another person.’

“\* \* \* \* \*

“1 Physical force may be used to restrain a student when:

“a. The student is physically attacking any other person;

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<sup>2</sup>“Student No. 2” and “John Doe” are pseudonyms.

- “b. The student is attempting to or threatening to attack any other person;
- “c. The student is engaged in destroying/damaging property;
- “d. The student is endangering him/herself;
- “e. When it is necessary to physically remove a student from one location to another;
- “f. In all cases, the physical force used shall overcome resistance from the student only;
- “g. In all cases, the physical force used shall be terminated when the student ceases his/her actions.”

The policy also required that an employee file a written report of any incident in which physical force was used to restrain a student.

Sesser reviewed the “Employee Handbook,” but read no other District policies on the District website. On September 11, 2005, Sesser signed a form in which she acknowledged that she had read and understood specific policies contained on the District’s website and the “Employee Handbook.” Board Policy JGAA was not one of the policies the District form required Sesser to acknowledge that she had read and understood. Sesser first learned about this board policy in August 2006, when the District began to investigate allegations that Sesser abused a student.

Some time after she began working for the District, Sesser asked that she be sent to Mandt training, a District-sponsored program that taught educators how to respond to aggressive students. The District never scheduled Sesser to attend this training, however.

10. For the 2005-2006 school year, the District employed three Instructional Assistants (IAs) in the Life Skills classroom at Amity Elementary School—Linda McGrew, Pam Burbank, and Megan Hatch. McGrew had worked with the District for twelve years, Burbank for two or three years, and Hatch for one year. In addition, the Amity School District provided another IA, Jennifer Lumsden, to work with the Life Skills students. Lumsden had several years of experience working with special needs students. Sesser and the IAs worked with about 11 students, not all of whom were in the Life Skills classroom at the same time. At times during the day, some of the Life Skills students were in regular classrooms. McGrew prepared a schedule that assigned Sesser and the IAs to perform specific tasks with specific students.

A number of professional specialists, including an autism specialist, a physical therapist, a speech therapist, an occupational therapist, a nurse, and a computer specialist regularly came to the Life Skills classroom to provide services to the Life Skills students. These specialists also taught Sesser techniques and strategies for dealing with her students. The occupational therapist, Edie Berglund, found Sesser very receptive to her suggestions.

11. Sesser had problems controlling the behavior of Student No. 2. On September 27, 2005, Sesser told Barkell that Student No. 2 “is hitting and kicking the staff. There are times when he is not safe in the classroom.” Sesser asked that Barkell meet with her, the student’s guardian, and other specialists to discuss Student No. 2’s behavior. Barkell suggested that Sesser videotape Student No. 2’s behavior and told her to contact the District autism specialist, if Student No. 2 was autistic, before meeting with the student’s guardian. Barkell urged Sesser to be “organized” in her approach to dealing with Student No. 2, and told her that under District policy, she was required to file an incident report if a student injured another student or adult. Barkell did not refer Sesser to Board Policy JGAA. Sesser never filed an incident report concerning any student behavior.

12. Beginning late September or early October 2005, Sesser began to have difficulties with John Doe, who was autistic and non-verbal. Doe easily became agitated and upset, had difficulty sitting in a chair because of his condition and energy, disrupted class, and required constant supervision. Doe often tried to scratch, hit, and kick students and staff members.

On October 11, 2005, Doe took off his clothes on the playground during recess. The principal of Amity Elementary School complained to Sesser about Doe’s behavior. Sesser called Barkell and reported what Doe had done. Sesser told Barkell that Doe moved so quickly that the substitute aide who was watching Doe was unable to stop him from taking off his clothes. Barkell told Sesser that he was concerned that Doe had not been monitored closely enough. Sesser replied that she and the District autism specialist believed that Doe needed a one-on-one aide, that is, an IA assigned to work only with Doe. In the e-mail by which he responded to Sesser, Barkell told her: “Well, the one-on-one assistant might be appropriate, but I fail to see that this sort of incident would not have occurred if, as you say, the proximity of the adult was not a reason for not preventing the behavior.”

Some time after the District placed Sesser on administrative leave in October 2005, the District assigned a one-on-one aide to work with Doe.

13. During the period that Sesser worked with him, Doe was a fourth grader, four to four-and-one-half feet tall, and weighed about 50-60 pounds. To stop Doe from hitting and to calm him, IA McGrew and the District autism specialist regularly put Doe's hands between their hands and told Doe "Quiet Hands." Autistic children often need pressure or compression on muscles or joints to calm them down. Occupational Therapist Berglund, who visited Sesser's classroom five times between September 1 and October 21, 2005, taught Sesser techniques for calming Doe. These techniques included use of a "kelliquilt," a heavy blanket, and a weighted vest that compressed Doe's muscles and joints. The augmentative communication specialist also visited Sesser's classroom twice a week and worked with Sesser and Doe. (Doe's IEP included a behavioral goal that he would "remain in a designated area without incident of leaving (running away, sneaking out of the room...) on all given opportunities.") The IEP also included a short-term objective that Doe "remain in a designated area *with physical assistance.*" (Emphasis added.)

14. Sesser sought help from Doe's parents in managing Doe's behavior. Doe's parents suggested that Sesser put Doe in a time-out chair when he misbehaved. Sesser initially used the time-out chair in an effort to calm Doe. She soon resorted to a time-out mat on the floor, believing that the chair was just another item that he could have fallen off of, or an item to be moved around, picked up, or even thrown. Doe regularly resisted being placed in time-out; when he did, Sesser took his arm or hands and directed him on to the time-out mat. Sesser had observed IAs McGrew, Burbank, and Hatch physically direct Doe and Student No. 2 when they resisted activities. Sesser attempted to use the same type of techniques and same degree of physical direction to put Doe in time-out when he was unwilling to go.

15. On October 3, 2005, Doe tried to hit, kick, and scratch Sesser as she was working with him. Sesser became concerned that Doe might injure a medically fragile student in her classroom. Sesser put Doe's hands between hers and told him "Quiet Hands." As Doe raised his foot to kick her, Sesser put her foot on top of Doe's foot, intending to stop him from kicking her. Although Sesser had never seen anyone place a foot on top of Doe's foot, Sesser thought her technique was comparable to the one she and other staff members used with Doe's hands.

At the end of the day, IA McGrew told Sesser that she saw Sesser put her foot on Doe's foot and did not think this was appropriate. Sesser told McGrew that she would not do this again.

16. IA Lumsden believed that Sesser had too much inappropriate physical contact with her students. One morning before classes began, Lumsden told Sesser that she should be careful because her actions with Doe might be misinterpreted.

17. Some time in October 2005, IA McGrew told Occupational Therapist Berglund that she was concerned because Sesser had, on one occasion, “stomped on” Doe’s foot. Berglund told McGrew that by law, she (Berglund) was required to report this incident to her supervisor.<sup>3</sup> Berglund then told District Assistant Director Barkell what McGrew told her concerning Sesser’s behavior with Doe

On October 21, 2005, Barkell talked with McGrew; McGrew told Barkell that she saw Sesser “stomp” on Doe’s foot. McGrew was very upset when she spoke to Barkell, and told him that she did not think what Sesser did to Doe was child abuse. Barkell explained that it was not up to him or McGrew to decide if Sesser’s actions constituted child abuse. McGrew also told Barkell that on several occasions, she had observed Sesser use more force with Doe than she believed was necessary.

18. After talking with McGrew, Barkell contacted Dave Novotney, Assistant Superintendent and Director of Human Resources for the District, and told him about McGrew’s complaint concerning Sesser. Because the complaint involved possible child abuse, and because the District was required to report the incident to the Oregon Department of Human Services, Novotney concluded that the District was obligated to place Sesser on leave.

At Novotney’s request, Barkell met with Sesser on October 21, 2005. Barkell told Sesser that a report had been made alleging that she abused a child, that the District was required to report the incident to the appropriate authorities, and that he was placing Sesser on paid administrative leave until the matter was resolved.

19. On October 25, 2005, Novotney sent Sesser a letter, with a copy to Tom Motko, OSEA field representative, which stated in part:

“As you know, Vern Barkell met with you on Friday, October 21, 2005, and placed you on paid administrative leave pending an investigation into allegations of potential child abuse.

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<sup>3</sup>By law, school employees are required to report any suspected abuse of a child. ORS 419B.005(3)(c) and ORS 419B 010.

“\* \* \* You will remain on paid administrative leave until an investigation in this matter is completed by law enforcement officials and [W]ESD administration. Upon a full investigation, a decision will be made regarding your status with this agency.”

20. Shortly after she received the District’s October 25 letter, Sesser talked with Novotney. Novotney told her about the allegation that she had “stomped on the foot of a student in her classroom.” In response to Sesser’s questions about her job status, Novotney explained that there was a range of possible outcomes, from reinstatement to the classroom, if the investigation established no child abuse, to possible dismissal, if “there was in fact some sort of child abuse.”

21. A few days after Novotney spoke with Sesser, he told OSEA Field Representative Motko the same information that he had provided to Sesser.

22. On October 26, 2005, at the request of the Department of Human Services, the Yamhill County Sheriff’s Office began an investigation into the allegations that Sesser had abused a child. The investigator summarized his interview with IA McGrew as follows:

“MCGREW told me [John Doe] an Autistic 10 year old child who is non verbal, he has been able to successfully communicate with his teachers by means of a ‘peck system’ of pictures and icons that indicate what he wants. MCGREW told me [Doe] has a tendency to hit objects, like a table or chair, and makes noises and hollers when frustrated. MCGREW told me [Doe] has struck out at a teacher but believed it was more frustration then [*sic*] trying to be hurtful.

“In essence MCGREW told me on 10-03-2005 she had observed SESSER ‘stomp on [Doe’s] foot’ and ‘push him down into the chair.’ When asked to explain MCGREW told me [Doe] was sitting at a table, SESSER was behind a curtain helping another teacher. When SESSER came out from behind the curtain [Doe] stood up and hollered at SESSER. According to MCGREW, SESSER responded by ‘stomping on [Doe’s] foot and pushing him to the seat’ saying to [Doe] ‘you’re going to stay in time out.’

“MCGREW could not tell me if [Doe] had any injury.

“MCGREW continued by telling me the class had an outing to the Dollar Store in McMinnville on 10-10-2005. According to MCGREW during the outing she observed SESSER ‘holding [Doe’s] hand on the (shopping) cart handle so tightly that I could see her fingers turning white ”

23. The investigator interviewed seven other witnesses in addition to McGrew. Among those interviewed were Doe’s parents and the other IAs in Sesser’s classroom. IA Hatch, reported seeing “SESSER force [Doe] down with a hand on the back of his neck. HATCH saw SESSER try to put [Doe] in a time out, forcing him down with her hands and stepping on his foot.” IA Burbank said, “SESSER seemed to be very physical, she made [Doe] sit in a chair and restrained him physically,” and that Sesser’s behavior “was inappropriate.” She described “the interaction between SESSER and [Doe] as a physical power struggle,” and said that Sesser “was also physical with other students.” IA Lumsden, told the investigator that she “observed SESSER shouting at and grabbing [Doe] and ‘forcing his movements.’” Lumsden said she cautioned Sesser “concerning her behavior telling her that ‘Red Flags’ would go up if people saw the way she handled [Doe].” IA Palmer told the investigator that she believed that Sesser’s behavior with Doe was “more than appropriate.” The sheriff’s investigator also interviewed a cafeteria supervisor, Dorothy Bert, and a mainstream classroom teacher, Diana Tippens, who had observed Sesser’s conduct with Doe. Bert told the investigator that she observed Sesser speak “gruffly” to Doe, and push him around. Tippens said that Sesser was extremely frustrated with Doe, and seemed very “overwhelmed.” Sesser refused to speak with the investigator.

24. On December 6, 2005, based on the Sheriff’s Office investigation, the Yamhill County District Attorney charged Sesser with Harassment, a Class B Misdemeanor.<sup>4</sup>

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<sup>4</sup>ORS 166 065(1) provides:

“A person commits the crime of harassment if the person intentionally:

“(a) Harasses or annoys another person by:

“(A) Subjecting such other person to offensive physical contact. \* \* \*”

25. On January 19, 2006, the District notified the Teacher Standards and Practices Commission (TSPC), in accordance with OAR 584-020-0041(2), that Sesser had been placed on leave pending an investigation into an allegation of potential child abuse; that the Sheriff's Office had conducted an investigation; and that the District Attorney's Office had filed charges against Sesser as a result of the investigation.

26. On January 20, 2006, OSEA and the District entered into an agreement with Sesser. By letter to OSEA representative Motko dated January 23, 2006, Novotney confirmed the terms of the agreement as follows:

- "1. The investigatory interview of Jane Sesser will be temporarily postponed until her legal issue is adjudicated. However, under no circumstance will this postponement extend beyond 180 days from the date of this letter.
- "2. Jane Sesser will be placed on unpaid administrative leave effective January 24, 2006. Ms. Sesser will not receive any salary or benefits as of this date.
- "3. Ms. Sesser's probationary status will be 'frozen' effective January 23, 2006. Time spent on unpaid administrative leave will not count toward Ms. Sesser's probationary status.
- "4. This agreement was entered into at the request of Jane Sesser and was for her convenience.
- "5. Jane Sesser and [OSEA] waive the [District] Board of Directors' responsibility to determine the renewal or non-renewal of Ms. Sesser's probationary contract and to notify her of its decision by March 15, 2006 (as specified in ORS 342.513). The Board of Directors maintains the right to determine the renewal or non-renewal of Ms. Sesser's probationary contract once the [W]ESD has completed its investigation into the matter."

27. Novotney conducted his own investigation into the allegations that Sesser abused a student. He finished the investigation by January 23, 2006. As

part of his investigation, Novotney reviewed the report of the Yamhill County Sheriff's investigator, and also interviewed the District director of special education, Occupational Therapist Berglund, a fourth-grade teacher, and IAs McGrew, Burbank, Hatch, Lumsden, and Palmer. On the advice of counsel, Sesser declined to speak to Novotney during his initial investigation. Novotney recorded the interviews, and prepared transcripts of the interviews.

28. On August 2, 2006, Yamhill County Circuit Court Judge Tichenor approved and entered a Diversion Order agreed to by Sesser and the District Attorney. The order specified that further criminal proceedings would be stayed for 180 days to allow Sesser to complete 40 hours of community service. The order also stated that if Sesser did not complete her community service by November 2, 2006, she would be tried on stipulated facts. The order specified that the stipulated facts for a trial, should one become necessary, would be based on the October 26, 2005 report of the Yamhill County Sheriff's investigator and a videotape Sesser prepared that showed IA Hatch working with Doe.<sup>5</sup> The Diversion Order included no admission as to the truth of any facts in the investigator's report and no plea by Sesser. Instead, language in the agreement specifying that Sesser pled guilty to the Harassment charge was crossed out and initialed by both Sesser's counsel and the District Attorney.

At the August 2 proceedings at which the Diversion Order was entered, the judge confirmed that Sesser understood the terms of the agreement she had made, and that she also understood that she had waived her right to a speedy trial by jury, as well as her right to hear, confront, and cross-examine witnesses at a trial.

29. Sesser completed the terms of her diversion agreement. The case was then formally dismissed in February 2007. On April 11, 2007, the Court entered an Order to Set Aside and Seal Records of Arrest in which the Court ordered Sesser's "record of arrest(s) be and the same hereby is set aside, and, for purposes of law, the defendant is hereby deemed not to have been previously arrested on said offense, and the defendant may accordingly answer any questions relating to said arrest(s) as if such events had not occurred."

30. On August 23, 2006, Novotney continued the District's investigation by interviewing Sesser. The interview lasted nearly two hours. Motko

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<sup>5</sup>The stipulation for Sesser's trial, if a trial had been held, would have been in the following form: if the individuals interviewed by the sheriff's investigator were called as witnesses, their testimony would consist of the statements they made to the sheriff's investigator contained in the October 26 report

represented Sesser at the interview, and Barkell was also present. Novotney's interview with Sesser was recorded and transcribed.

31. Sesser requested that Novotney interview two additional witnesses, the autism specialist and the school nurse. Novotney subsequently interviewed the requested witnesses. The autism specialist told Novotney that he believed Sesser used too much physical manipulation with her students and that he was uncomfortable with Sesser's conduct in the classroom. He told Novotney that if Sesser had continued behaving in this manner, he would eventually have interceded. The school nurse told Novotney that she did not have much information to share with him.

32 On October 8, 2006, Novotney prepared a six-page Preliminary Report. The report stated, in relevant part:

"On October 21, 2005, Linda McGrew, an Instructional Assistant, reported a concern that Ms. Sesser was physically abusive toward a student in her classroom. Ms. McGrew reported her concern to Vern Barkell, Assistant Director of Special Programs, and she filed a report with the Department of Human Services \* \* \* and Board Policy \* \* \*."

"\* \* \* \* \*

"The legal issues brought against Ms. Sesser culminated in a Diversion Order signed on August 2, 2006 (Please see Exhibit G). The Diversion Order requires Ms. Sesser to obey all laws and complete 40 hours of community services by November 2, 2006. If she fails to perform these conditions satisfactorily, Jane has agreed to a Stipulated Facts Trial on one count of Harassment. She also agreed that the attached police report (Exhibit C) and a video would be the agreed upon set of facts for a Stipulated Facts Trial.

"\* \* \* \* \*

#### **Interviews**

"In addition to interviewing Jane Sesser, I interviewed the following eleven (11) individuals as a part of my investigation.

“Ann O’Connell, Director of Special Programs  
“Martin Sands, Autism Specialist  
“Edie Berglund, Occupational Therapist  
“Moynelle Schmidt, School Nurse  
“Diana Tippens, 4<sup>th</sup> Grade Teacher, Amity Elementary School  
“Dorothy Bert, Food Supervisor, Amity Elementary School  
“Linda McGrew, Instructional Assistant  
“Pamela Burbank, Instructional Assistant  
“Meagan Hatch, Instructional Assistant  
“Jennifer Lumsden, Instructional Assistant  
“Evelyn Palmer, Instructional Assistant

“Findings

“The preponderance of the information indicated that Jane Sesser did, in fact, use unreasonable physical force while interacting with a student in her classroom. The following information supports this conclusion.

“1. On August 2, 2006, Ms. Sesser signed a Diversion Order (Exhibit G) and agreed that the attached police report (Exhibit C) and a video contained the agreed upon facts if a Stipulated Fact Trial became necessary. In essence, Ms. Sesser agreed that the following witness statements contained in the police report were indeed factual statements.

“• ‘In essence McGrew told me on 10-3-2005 she had observed Sesser “stomp on [A.G.’s][<sup>6</sup>] foot” and “push him down into the chair.” When asked to explain McGrew told me [A.G.] was sitting at a table, Sesser was behind a curtain helping another teacher. When Sesser came out from behind the curtain [A.G.] stood up and hollered

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<sup>6</sup>Throughout the report, Novotney used the initials “A.G.” to refer to Doe.

at Sesser. According to McGrew, Sesser responded by “stomping on Andy’s foot” and pushing him to the seat saying to [A.G.] “you’re going to stay in time out.” Linda McGrew reported this incident to her supervisor and the Department of Human Services

- “• ‘Hatch told me she observed Sesser and believed she was “very hands on” meaning physical, with [A.G.], “she wouldn’t talk to him, she yelled and wouldn’t get down to his level. She got frustrated. Hatch saw Sesser force [A.G.] down with a hand on the back of his neck. Hatch saw Sesser try to put [A.G.] in time out, forcing him down with her hands and stepping on his foot. When asked if she thought Sesser handled [A.G.] appropriately she responded “no”.
- “• ‘According to Burbank, Sesser seemed to be very physical, she made [A.G.] sit in a chair and restrained him physically. Burbank indicated Sesser’s behavior was inappropriate when I asked. She told me “The rest of us don’t have to do that.” Burbank described the interaction between Sesser and [A.G.] as a physical power struggle. Burbank told me Sesser was also physical with other students.
- “• ‘Lumsden told me she observed Sesser shouting at and grabbing [A.G.] and “forcing his movements” Lumsden said she had spoken with other teachers and Sesser concerning her behavior telling her that “Red Flags” would go up if people saw the way she handled [A.G.].... When I asked if Lumsden felt Sesser’s behavior was appropriate she responded “if it were my child I’d be filing a lawsuit.”

“The fact that Ms. Sesser formally agreed with the information contained in the police report and the fact that the report contained such strong statements, from multiple witnesses, was critical to this investigation.

- “2. The interviews I conducted with Willamette ESD staff and Amity School District employees corroborate the information contained in the police report. Witness statements were consistent between what was reported to the police and what was reported to me during the interview process. \* \* \*
- “3. It is important to point out that Jane Sesser’s interview statements regarding how she interacted with the student, were not consistent and her overall position regarding this matter changed over time. As previously mentioned, Ms. Sesser agreed on August 2, 2006, that the information contained in the attached police report was factual. However, three weeks later during my interview with Ms. Sesser on August 23, 2006, she informed me that she only used minimal force while restraining the student. She also informed me that her use of physical force was warranted to protect a medically fragile student in the classroom and to prevent the student from hitting, kicking, and scratching her. For example, during our interview, Ms. Sesser responded to one of the witness statements contained in the police report as follows:

“Dave [Novotney]: ‘...According to McGrew, Sesser responded by stomping on [A.G.’s] foot and pushing him into the seat, saying to [A.G.], “you are going to stay in time out.” Could you please respond to that?’

“Jane: ‘Okay, first of all, I did not stomp on [A.G.’s] foot at any time. [A.G.] was trying to hit, scratch, and kick me. I held his hands to stop him from hitting me. I put my foot on his foot to

try and stop him from kicking me. *Pushing* him to his seat, this was a technique that was suggested by (D.G.), the mother [Doe's], over the phone.... The reason I was very concerned about it, was because the child I was helping behind the curtain was a very medically fragile child.... I was worried that [A.G.] would run and hurt this child who had a shunt in his head....'

"Dave: 'Do you recall stepping on [A.G.'s] foot or placing your foot on top of his?'

"Jane: 'I did. One day, that one day, I placed my foot on top of his foot, trying to hold his foot down in the same way that I was trying to hold his hands, but I did not stomp on it. I did not hurt him. I just put my foot on top of his, trying to keep it on the floor because he was standing up and trying to kick me while I was trying to hold his hand.'

"At one point during the interview, Ms. Sesser verbally described the physical restraints she used with the student while demonstrating her techniques on a male volunteer.

"Jane: 'He would be fighting, kicking, hitting, and I would kind of *push* him into the chair. I would bring the chair to come around the back of him, hold him like this. I am *not pushing* him in the chair. I am pulling him gently into the chair, trying to make him stay in the chair.'

"Dave: '...How much force do you believe you used in either getting [A.G.] down to the chair, or actually holding him in the chair?'

"Jane: 'Getting him in the chair would probably be mild to moderate. Holding him in the chair was mild to insignificant.'

“This portion of Ms. Sesser’s interview is a good example of the lack of internal consistency in her statements. For example, in one sentence she said: ‘...I would kind of *push* him into the chair’ and then two sentences later she corrected herself when she said, ‘I am *not pushing* him in the chair.’ These types of inconsistencies are note worthy when considering the credibility of an individual’s statement during an interview.

“In addition, although Jane Sesser claimed that she only used minimal force while physically restraining the student, she freely admitted to using physical force to pull the student to the floor (or a mat) on multiple occasions. For example.....

“Dave: ‘.....How many times during a typical day did you need to utilize that technique on [A.G.]?’

“Jane: ‘After I talked to his dad, and his father showed me how they worked with him, and I saw Pam do that, this was the first Wednesday; *I used it all day long, several times.* Each day, it decreased. One week later, I did not have to use it at all.’

“Dave: ‘Generally, on each of these occasions, was [A.G.] going down to the floor? Is that it?’

“Jane: ‘I pulled him to the floor, yes. Or to a mat on the floor.’

“Dave: ‘And you thought that was an effective technique to interact with [A.G.]?’

“Jane: ‘It seemed to work.’

“I was unable to find a single witness who believed that the use of physical force to restrain this student was warranted. The student needed a significant

amount of guidance and attention but not physical restraint.

“\* \* \* \* \*

- “4. It is also important to point out that Jane Sesser felt that the Willamette ESD failed to support her as a first-year special education teacher. However, a review of the data related to the amount of time Willamette ESD administrators and specialists were in Ms. Sesser’s classroom revealed that she did, in fact, receive significant support from the ESD. From September 6, 2005 to October 21, 2005, one administrator and eight different specialists visited her classroom a total of 49 different times during the 34 instructional days Ms. Sesser was in the class room. These individuals spent in excess of 73 hours in Ms. Sesser’s classroom to support her and help meet the needs of her students (Please see Exhibit H).

**“Conclusion**

“The preponderance of evidence revealed that Jane Sesser did, in fact, use unreasonable physical force while interacting with a student in her classroom. According to Board Policy JGAA, ‘employees may use physical force to restrain a student when such student’s actions create a danger to other persons, property, or themselves.’ (Please see Exhibit I). My investigation revealed that the student’s actions did not create a danger to other individuals, property or himself. Therefore, the use of physical force to restrain the student was a clear violation of Board Policy JGAA. Furthermore, the evidence revealed a serious and ongoing lack of professional judgment by Jane Sesser that subjected a special needs student to unnecessary physical and emotional trauma and potentially exposed the Willamette ESD to unnecessary legal liability. I also believe there is a possible violation of the Teacher Standards and Practices Commission’s Standards for Competent and Ethical Performance of

Oregon Educators, specifically OAR 584-020-0040(4)(d). The Teacher Standards and Practices Commission, however, is unlikely to complete their investigation into this matter for several months.

“I recommend that Jane Sesser’s employment with the Willamette ESD be terminated.” (Emphasis in original.)

Novotney attached nine exhibits to the report including copies of the Sheriff’s Office case report, the District Attorney’s criminal charge, the WESD physical force policy, and Sesser’s interview.

33. On October 16, 2006, Novotney and Barkell met with Sesser and OSEA representative Motko. Novotney gave Sesser and Motko a copy of his preliminary report. Sesser and Motko read and discussed the report privately for about 45 to 60 minutes, and made a list of facts and issues in the report with which they disagreed. Novotney then gave Sesser and Motko an opportunity to respond to the report.

34. On November 7, 2006, Dave Novotney completed a Final Report into the Sesser investigation, and gave it to District Superintendent Dr. Maureen Casey. The final report was identical to Novotney’s preliminary report except for the addition of a paragraph describing Novotney’s October 16 meeting with Motko and Sesser to review the preliminary report.

35. By letter dated November 21, 2006, Novotney informed Sesser and Motko that Superintendent Casey would recommend to the District Board of Directors that the District dismiss Sesser. Novotney explained the reasons for Sesser’s dismissal as follows:

“A copy of my final investigative report is incorporated into this notice as an attachment and provides the rationale for recommending dismissal in this case. To summarize, however, my investigation revealed the following:

- “1. The preponderance of evidence revealed that you did, in fact, use unreasonable physical force while interacting with a student in your classroom. According to Board Policy JGAA [Reasonable Physical Force Policy], ‘employees may use physical force to restrain a student when such student’s

actions create a danger to other persons, property, or themselves.' My investigation revealed that the student's actions did not create a danger to other individuals, property or himself. Therefore, the use of physical force to restrain the student was a clear violation of Board Policy JGAA.

- “2. The evidence revealed a serious and ongoing lack of professional judgment that subjected a special needs student to unnecessary physical and emotional trauma and potentially exposed the [WESD] to unnecessary legal liability.” (Emphasis in original.)

In his letter, Novotney told Sesser that she could request a hearing on her dismissal before the District Board.

36. On December 12, 2006, the District Board of Directors dismissed Sesser, and notified Sesser and Motko of this action by letter dated December 13, 2006. Neither Sesser nor OSEA requested a hearing before the board on Sesser's dismissal.

37. On January 16, 2007, Sesser and OSEA filed a grievance

“\* \* \* protest[ing] that [Sesser] has been dismissed by letter dated December 13, 2006, without the due process of progressive discipline as required by the collective bargaining agreement. The Employer failed to exercise progressive discipline in dismissing [Sesser], moving directly to dismissal. The Employer failed to conduct a sufficient investigation of the allegations against [Sesser]. The Employer failed to fully inform [Sesser] of the charges against her. The Employer failed to give [Sesser's] response to charges sufficient weight in reaching the decision to dismiss. The Employer failed to give consideration to [Sesser's] past record in determining to dismiss her. The dismissal of [Sesser] is not in proportion to [Sesser's] alleged offense. The allegations against [Sesser] are untrue.”

38. On January 16, 2007, Novotney told Motko that the District would not accept the grievance because the grievance procedure expired with the contract.

39. On April 16, 2007, the TSPC informed Sesser that it was taking no further action on the report based on insufficient cause to justify a hearing.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.<sup>7</sup>
2. The District violated ORS 243.672(1)(e) when it dismissed Jane Sesser.

Jane Sesser was a first-year special education teacher with the District who taught a Life Skills class. The District dismissed Sesser for two reasons: (1) she violated a District policy by using “unreasonable physical force” with a student; and (2) she subjected a student to “unnecessary physical and emotional trauma” and exposed the District to potential legal liability. The Association contends that the District failed to comply with the provisions of Article 7, Section 9.01 from the expired collective bargaining agreement when it dismissed Sesser. In particular, the Association alleges that the District did not provide Sesser with due process, did not utilize progressive discipline, and disciplined Sesser in a manner that was disproportionate to the seriousness of her alleged offense. The Association asserts that these District actions constituted a change in the *status quo* in violation of ORS 243.672(1)(e).

Under ORS 243.672(1)(e), an employer violates its duty to bargain in good faith if it makes a unilateral change in employment relations after a collective bargaining agreement has expired and before a new contract has been executed. *Wy’East Education Association v. Oregon Trail School District No. 46*, Case No. UP-32-05, 22 PECBR 108, 139 (2007). The employer’s duty to maintain the *status quo* extends only to employment relations, *i.e.*, subjects which are mandatory for bargaining ORS 243.650(7); and *Portland Community College Declaratory Ruling*, Case No. DR-6-86, 9 PECBR 9018, 9024 (1986).

We begin our inquiry in a unilateral change case by determining the *status quo*. Our analysis starts with the parties’ expired collective bargaining agreement. When an expired contract addressed the subject at issue, these provisions establish the *status quo*. See *Wy’East Education Association v. Oregon Trail School District*, 22 PECBR

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<sup>7</sup>Because OEA was certified as the exclusive bargaining representative for the academically licensed employees on February 5, 2007, OEA succeeded to the *status quo* conditions established by the 2003-2006 collective bargaining agreement between WESD and OSEA.

at 139; and *Hillsboro Education Association v. Hillsboro School District*, Case No. UP-7-02, 20 PECBR 124, 136-38 (2002), *AWOP*, 192 Or App 672, 89 P3d 688 (2004).

Here, Article 7, Section 9.01 from the expired collective bargaining agreement concerns the manner in which the District disciplines an employee. This contractual provision states that the District “will use due process and progressive discipline when disciplining or dismissing employees,” and specifies other steps the District must take in investigating charges against an employee and determining appropriate discipline. The language further provides that any disciplinary action taken by the District will “be in proportion to the seriousness of the employee’s offense.” These provisions constitute the *status quo*.

We must also determine whether the *status quo* concerns a mandatory subject for bargaining. A just cause proposal, which addresses the standards and methods used to discipline employees, is a mandatory subject for bargaining. *Cooper v. Oregon Department of Corrections and Executive Department, Personnel & Labor Relations Division*, Case No. UP-22-92, 14 PECBR 93, 105 (1992); *Salem-Keizer Association of Classified Employees v. Salem-Keizer School District No. 24J*, Case No. UP-104-90, 13 PECBR 89, *adh’d to on recons*, 13 PECBR 166 (1991); and *Oregon Nurses Association v. Eastern Oregon Psychiatric Center*, Case No. UP-15-86, 9 PECBR 9236 (1986). In addition, proposals that concern an employee’s right to due process and minimum fairness during an evaluation procedure or a process to resolve complaints about the employee are also mandatory. See *Gresham Grade Teachers Association v. Gresham Grade School District No. 4*, Case No. C-61-78, 5 PECBR 2771, 2803 (1980); and *Springfield Education Association v. Springfield School District No. 19*, Case Nos. C-278/279/280-78, *order on remand*, 3 PECBR 1950, 1958 (1978), *aff’d as modified*, 290 Or 217, 621 P2d 547 (1980).

Here, Article 7, Section 9.01 addressed subjects we have found to be mandatory—due process, standards for discipline, and minimum fairness criteria. Accordingly, after the contract expired, the District was obligated to continue to comply with these provisions as part of its duty to maintain the *status quo* while the parties negotiated a new contract. If the District violated the terms of Article 7, Section 9.01 when it dismissed Sesser, it unlawfully changed the *status quo* and violated subsection (1)(e). This determination requires us to interpret Article 7, Section 9.01 and apply it to these facts.

When we interpret the terms of an expired collective bargaining agreement to determine the *status quo*, we use the familiar analysis from *Yogman v. Parrott*, 325 Or 358, 361-64, 937 P2d 1019 (1977). See *Hillsboro Education Association v. Hillsboro School District*, 20 PECBR at 137-38. Our goal is to determine the intent of the parties.

ORS 42.240. We begin by examining the words of the contract in context. *Yogman v. Parrott*, 325 Or at 361-62. We generally give words their ordinary meaning. *Id.* at 362. In addition, custom and usage can establish the meaning the parties intended for particular contract terms. *VTech Communications, Inc. v. Robert Half, Inc.*, 190 Or App 81, 87-88, 77 P3d 1154 (2003).

The crucial terms in Article 7, Section 9.01—“due process,” “progressive discipline,” and “[d]isciplinary action \* \* \* in proportion to the seriousness of the employer’s offense”—are core concepts in labor relations that are frequently used in public sector collective bargaining agreements in Oregon. These terms are regularly analyzed by arbitrators and there are treatises written about them. *E.g.*, Norman Brand, *Discipline and Discharge in Arbitration* (BNA 1998). The terms are so commonly used and so well known in the labor relations community that we presume the parties understood their customary usage when they agreed to include them in their collective bargaining agreement. In addition, the parties included an arbitration provision in their agreement. This further demonstrates their intent to apply arbitral standards to the interpretation of the agreement. In such circumstances, we give “full consideration to the principles established over the years—mostly by arbitrators—that compose what often is called the ‘common law of labor relations.’” *OSEA v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8849 (1986).

We begin by analyzing the contractual requirement that the District provide “due process” when it disciplines or dismisses a bargaining unit member. We look to the standards developed by arbitrators that constitute the “common law of labor relations” on the subject.

Arbitrators define “industrial due process” as a series of implicit standards that provide employees with basic fairness in disciplinary situations. Among other things, these standards include the requirement that an employer give an employee actual or constructive notice of the conduct the employer expects and the penalties for failure to meet these expectations.<sup>8</sup> Industrial due process also includes a requirement that an employer base its disciplinary decision on facts acquired through an investigation.

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<sup>8</sup>The issue of notice of the employer’s expectations has frequently arisen in appeals filed with this Board under the State Personnel Relations Law, ORS Chapter 240. We have held that a reasonable employer is one that defines the performance expected of employees and gives employees clear notice of those expectations. *Nass v. State of Oregon, Employment Department*, Case No. MA-6-03 at 9 (February 2004), citing *Ash v. State of Oregon, Department of Transportation*, Case No. MA-21-98 at 8 (June 2000), *AWOP*, 184 Or App 226, 56 P3d 968 (2002); and *Stark v. Mental Health Division, Oregon State Hospital*, Case No. MA-17-86, *recons.*, at 36 (April 1989).

Norman Brand, *Discipline and Discharge in Arbitration*, 34 (BNA 1998); *see also OSEA v. Amity School District*, Case No. UP-44-94, 15 PECBR 811, 822 (1995) (contractual language requiring due process for discipline requires that the reason for dismissal be relied upon and supported by the evidence).<sup>9</sup>

Our analysis of a due process provision differs from our analysis of a contractual provision that specifies that an employer must have just cause to discipline or discharge an employee. In a case involving just cause, we decide, among other things, if the employee actually did what he or she was disciplined for doing. *See*, for example, *Wy'East Education Association v. Oregon Trail School District*, 22 PECBR at 140; *OSEA v. Klamath County School District*, 9 PECBR 8832; *Association of Oregon Corrections Employees v. Oregon Department of Corrections*, Case No. UP-21-94, 15 PECBR 621 (1995); and *Ralphs v. OPEU and State of Oregon Executive Department*, Case Nos. UP-68/69-91, 15 PECBR 115, *recons*, 15 PECBR 474 (1995). Here, the expired contract contains no just cause provision and we have no reason to determine if Sesser did what the District claimed she did.<sup>10</sup>

We begin our analysis by considering the District's dismissal of Sesser in light of two of the implicit due process requirements: that an employee receive notice of performance expectations and that disciplinary action be based on evidence acquired through an investigation.

As discussed above, the District gives two reasons for dismissing Sesser. First, the District concluded that Sesser used "unreasonable physical force while interacting with a student [Doe]" in violation of Board Policy JGAA. Second, the

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<sup>9</sup>The due process clause of the Fourteenth Amendment of the United States Constitution affords certain due process rights to employees of a state or local government. Constitutional due process entitles an employee to: (1) notice of charges against the employee and possible sanctions the employer is considering; and (2) an informal opportunity to refute these charges. *Tupper v. Fairview Hospital*, 276 Or 657, 662, 556 P2d 1340 (1976); and *OSEA v. Rainier School District No. 13*, 311 Or 188, 195, 808 P2d 83 (1991). Where, as here, a collective bargaining agreement contains these due process protections, the contract satisfies constitutional requirements. *Armstrong v. Meyers*, 974 F2d 948, 950 (9<sup>th</sup> Cir 1992).

<sup>10</sup>We agree with our dissenting colleague that under the contract language presented here we are not called upon to determine whether Sesser engaged in the conduct for which she was dismissed. *See, e.g., OSEA v. Amity School District*, 15 PECBR 811 (in reviewing a contractual due process provision, we determine only whether the employer complied with the contract article and do not "substitute our judgment for the District's concerning the appropriate degree of discipline to be imposed for proven misconduct"). *OSEA v. Amity School District*, 15 PECBR at 823.

District concluded that Sesser displayed “a serious and ongoing lack of professional judgment \* \* \* that subjected a special needs student [Doe] to unnecessary physical and emotional trauma and potentially exposed the Willamette ESD to unnecessary legal liability”<sup>11</sup>

Turning first to the District’s charge that Sesser used excessive physical force with Doe in violation of Board Policy JGAA, we conclude that the District failed to adequately notify Sesser about the existence of this policy and the standard of conduct it expected. Board Policy JGAA specifies the situations in which an employee may use physical force to restrain a student. The policy defines physical force as “any force a person uses against another person.” It lists the following situations in which an employee may use physical force with a student: when the student is threatening or attempting to attack, or actually attacking another person; when the student is damaging property; when the student is endangering him or herself; and when it is necessary “to physically remove a student from one location to another.”

When Sesser began working for the District in September 2005, Board Policy JGAA was available only on the District’s website. Although some of the materials given to Sesser when she was hired referred to this website, she was told that she was expected to familiarize herself with only specific portions of the website. Board Policy JGAA was not included in the on-line “Employee Handbook” which Sesser was directed to read, and was not among the policies the District required Sesser to acknowledge that she had read and understood. Nor did Sesser’s supervisor, Barkell, tell Sesser about Board Policy JGAA when two situations arose that involved disruptive student behavior. On September 27, Sesser told Barkell that Student #2 was hitting and kicking staff members and was “not safe” in the classroom. On October 11, Sesser told Barkell that Doe had taken his clothes off and run through the playground. Given these situations, it was probable that Sesser would need to use some type of physical restraint with Doe or Student #2. Barkell never referred Sesser to Board Policy JGAA, however. Instead, Barkell cautioned Sesser to file an incident report if Student #2 injured anyone. Sesser first learned about Board Policy JGAA during the investigation into the incidents that resulted in her dismissal.

Knowledge of Board Policy JGAA, and the District’s expectations regarding the use of force, were particularly critical for Sesser for a number of reasons. First, Sesser

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<sup>11</sup>The contract specifies that “[t]he employee will be given notice of the charges” upon which the disciplinary action is based. In light of this requirement, we will confine ourselves to the two charges the District identified. We will not decide or speculate whether the District may have had other valid reasons for dismissing Sesser.

was a new teacher who had never worked with special needs students comparable to those with whom she worked at the District. During her job interview, Sesser specifically told the District representatives who interviewed her that she lacked experience with students such as Doe. The District representatives gave Sesser some assurance that she would be provided with guidance and assistance.

Second, Doe's IEP, a document mandated by federal law that specifies educational goals Sesser was required to meet, listed learning how to "remain in a designated area *with physical assistance*" as one of these goals. (Emphasis added.) This clearly contemplates some type of physical contact. The District should have notified Sesser about the type of physical assistance the District considered appropriate to meet the IEP goal.

Third, the standards for controlling Doe were unclear not only to Sesser, but also to experienced educators who were supposed to assist Sesser. Occupational Therapist Berglund admitted that it was difficult to decide when it was appropriate to use physical force with a non-verbal student such as Doe. When questioned by the ALJ at the hearing about what to do if a non-verbal student tried to hit or kick her, Berglund had difficulty explaining how to use appropriate physical guidance; she eventually resorted to gestures to demonstrate the techniques she utilized. This type of uncertainty from one who was assigned to assist Sesser and her students demonstrates that the District did not adequately advise Sesser about its expectations.

Fourth, the District apparently understood not only that physical contact with students was sometimes necessary, but also that it was a matter that required special instruction. The District sponsored a Mandt training program that taught employees the proper techniques to use with aggressive students. The District never gave Sesser this training and thus failed to adequately inform her of its expectations.

Fifth, the District's policy concerning allowable physical force differs significantly from that which is permitted under state statute. ORS 161.205 provides that the use of physical force "is justifiable and not criminal" under certain circumstances. Under ORS 161.205(1), a teacher may use

"reasonable physical force upon a student when and to the extent *the teacher reasonably believes* it necessary to maintain order in the school or classroom \* \* \*." (Emphasis added.)

Board Policy JGAA is considerably more restrictive than the statute. Unlike the statute, the District's policy does not permit an employee to decide when or the extent to which

it may be necessary to use reasonable physical force. Instead, the policy specifies particular situations in which force may be used and does not permit use of physical force solely to maintain order in the classroom. We agree with our dissenting colleague that Sesser can reasonably be expected to know the law regarding a teacher's use of physical force. Because of the substantial differences between the law and District policy, however, knowledge of the law is of little use in knowing the requirements of Board Policy JGAA.

Basic fairness dictates that before an employer disciplines an employee for failing to meet its expectations it must first give the employee fair notice of these expectations and an opportunity for the employee to fulfill them. Considering Sesser's inexperience, the requirements of her job, and the demands made upon her by her students, the District's failure to notify her about its policy concerning the reasonable use of physical force was a significant violation of due process notice requirements.

The District argues that its expectations regarding the use of physical force are so obvious that Sesser should have understood them, even without any specific notice of Board Policy JGAA. We agree that some rules of conduct in the workplace "are so basic and universally known that they need not be contained in a written rule or expressly stated as a job expectation. \* \* \* For example, there is no need to inform employees that they cannot steal from the employer or punch their boss." *Nass v. Employment Department* at 9. The standards set forth in Board Policy JGAA, however, are neither "basic" nor "universally known." The situations in which the District expects or authorizes an employee to use physical force, and the type of physical force the District considers reasonable, are not matters so obvious that they need not be expressed in a written rule. Superintendent Novotney himself acknowledged this fact when he was questioned about the use of physical force in particular situations. Novotney testified that "[i]t's okay to use a small amount of force to guide a student away from you if they are striking, but it is unreasonable if you're forcing their movements down into a chair, on the floor, and so on." The distinction that Novotney made—between "a small amount of force" considered reasonable and the "forcing" of movements considered unreasonable—is not one which can be readily understood without reference to a written policy.

The District expected that Sesser would use a particular level of physical force in certain circumstances consistent with the requirements of Board Policy JGAA. However, the District bears the burden of making its expectations clear. The District did not carry this burden. It failed to notify Sesser about Board Policy JGAA and provided her with no other guidance or training regarding its expectations concerning the use of physical force with students. We conclude that the District violated the due process

provision in the expired contract when it did not give Sesser notice of Board Policy JGAA, and then dismissed her for failing to comply with the requirements of this policy.

We turn next to the second reason for which the District dismissed Sesser: the allegation that Sesser subjected Doe to physical and emotional trauma. As discussed above, one of the minimum fairness requirements implicit in due process is that an employer base disciplinary action on facts discovered through an investigation. Here, the record is devoid of *any* evidence that indicates how Sesser's actions physically or emotionally affected Doe.<sup>12</sup> Instead, the District's investigation focuses almost entirely on Sesser's behavior. Barkell's investigatory reports contain no information about the effect of Sesser's alleged abuse on Doe. None of the witnesses that Barkell interviewed stated that Doe cried out in pain or even grimaced when Sesser allegedly "stomped" on his foot, or that Doe suffered any momentary or lasting physical injury as a result of this action. None of the witnesses reported any change in Doe's behavior or any other signs of emotional distress after the alleged foot stomping incident. In fact, eyewitness McGrew told Barkell that she did not believe that Sesser abused Doe when she stepped on his foot. McGrew's comment indicates a belief that the foot incident she witnessed resulted in no injury to Doe. Accordingly, we conclude that there are no facts in the District's investigation reports to support the District's second reason for dismissing Sesser—that Sesser physically and emotionally traumatized Doe.

In sum, we conclude that the District violated the due process requirements of Article 7, Section 9.01 from the expired contract when it failed to give Sesser adequate notice of its expectations and failed to base its dismissal decision on evidence acquired through an investigation.<sup>13</sup> Because of this conclusion, it is unnecessary to

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<sup>12</sup>We observe that the District paid little attention to Doe when it investigated the allegation that Sesser abused him. Contrary to the dissent's suggestion, the fact that Doe is autistic and non-verbal does not excuse the District from the due process requirement that the reasons for which it dismissed Sesser be based on evidence acquired through an investigation. There is no evidence in the record to support the charge that Sesser injured and traumatized Doe. Admittedly, Doe could not clearly express pain or tell someone that Sesser hurt him. However, the District could have questioned other employees or Doe's parents about any indications that Doe suffered emotional or physical injuries.

<sup>13</sup>It should perhaps be unnecessary to state, but we emphasize that our decision in this case must not be considered as an expression of indifference to possible child abuse. While we wholeheartedly condemn *any* abuse of students, we hold that the District's conclusion that Sesser physically or emotionally traumatized Doe was completely unsupported by evidence discovered during an investigation.

(continued...)

determine if the District's actions violated any other requirements of this contract provision.

### Remedy

We have concluded that the District did not comply with the requirements of Article 7, section 9.01 in the expired contract when it dismissed Sesser. By so doing, the District unlawfully changed the *status quo* in violation of ORS 243.672(1)(e). We will order the District to cease and desist from its unlawful actions. ORS 243.676(2)(b).

In addition, where an employer disciplines an employee in a manner inconsistent with the provisions of an expired collective bargaining agreement, we exercise our remedial power to restore the *status quo ante*. *Cooper v. Department of Corrections*, 14 PECBR at 109; and ORS 243.676(2)(c). We will order the District to reinstate Sesser to the position she held prior to her dismissal and make her whole for pay and benefits lost as a result of her dismissal.<sup>14</sup>

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<sup>13</sup>(...continued)

We also note that Sesser was cleared of any allegations that her actions constituted either criminal child abuse, or abuse sufficiently serious to result in loss of her teaching certificate. The Yamhill County Circuit Court dismissed the criminal charges against Sesser in February 2007 and expunged her record. In April 2007, the TSPC declined to pursue allegations that Sesser abused a student.

<sup>14</sup>Although the evidence considered by the District does not support its decision to dismiss Sesser, it does indicate that Sesser had serious difficulties with her Life Skills assignment and students. Our order that the District cease and desist in its unlawful discipline of Sesser and reinstate her to her position does not leave the District powerless to take action to correct problems with Sesser's teaching. The record demonstrates that Sesser was open to suggestions about how to improve her teaching, and receptive to training opportunities offered by the District. As a new teacher who lacked experience with the type of students the District assigned her to teach, Sesser could undoubtedly benefit from additional training, and guidance from the specialists with whom she works. We also note that the law requires the District to use an evaluation procedure to assess Sesser's performance and provide her with a plan of assistance if areas for improvement are noted. ORS 342.850.

ORDER

1. The District shall cease and desist from dismissing Sesser without due process. The District shall delete all materials concerning Sesser's dismissal from her personnel file.

2. The District shall reinstate Sesser to the position she held prior to her dismissal. The District shall make Sesser whole for the wages and benefits she would have received if she had continued working for the District, less interim earnings, with interest at 9 percent per annum, for the period beginning on December 12, 2006 and ending on the date the District reinstates her.

DATED this 17<sup>th</sup> day of July 2008.



Paul B. Gamson, Chair

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\*Vickie Cowan, Board Member



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Susan Rossiter, Board Member

\*Board Member Cowan Dissenting.

This Order may be appealed pursuant to ORS 183.482.

Board Member Cowan Dissenting:

The Association contends that the District violated the status quo when it dismissed probationary teacher Jane Sesser. I agree with the majority that Article 7, Section 9.01 of the parties' expired contract determines the status quo for purposes of

this case. There is no “just cause” provision in the expired contract nor do we infer one. *OSEA, Chapter 81 v. Stanfield School District 61R*, Case No. UP-11-06, 21 PECBR 505 (2006), *AWOP*, 215 Or App 358, 168 P3d 1262 (2007). Although “due process” requires that the reason for a dismissal be relied on and supported by the evidence, this Board’s review of a disciplinary action is *more limited* under the express terms of the contract than it would be under a “just cause” standard. *OSEA v. Amity School District 4J*, Case No. UP-44-94, 15 PECBR 811 (1995). Our inquiry here is restricted to determining whether the District complied with Article 7, Section 9.01.

Article 7, Section 9.01 requires the District to follow certain due process procedures prior to discharging an employee. The District must investigate the allegations, inform the employee of the charges, provide the employee with the opportunity to respond, consider the employee’s past record, and proportion the discipline to the seriousness of the offense.

The majority acknowledges that the District performed a lengthy and thorough investigation. As a result of that investigation, the District discovered that several more-experienced coworkers witnessed Sesser using unreasonable physical force while interacting with Doe. IA Hatch saw Sesser force Doe down with a hand on the back of his neck. Another time she saw Sesser force Doe down with her hands while stepping on his foot. IA Burbank saw Sesser make Doe sit in a chair and used inappropriate physical force to restrain him. IA Lumsden observed Sesser shouting at, grabbing, and forcing Doe’s movements. Lumsden warned Sesser that her behavior was not appropriate. On October 3, 2005, IA McGrew witnessed Sesser “stomp” on Doe’s foot and “push” him into a chair, in response to Doe standing up and shouting.

As part of her plea agreement, Sesser agreed that, if she did not complete her diversion program, these witness statements would constitute the facts of a stipulated-facts trial. The witnesses would not be subject to cross-examination and their statements would constitute the facts on which the court would determine whether or not Sesser was guilty as charged.

Because Sesser stipulated that the witnesses statements were facts for purposes of a trial, I disagree with the majority’s Finding of Fact No. 15 which provides that “Doe tried to hit, kick, and scratch Sesser.” Other than Sesser’s self-serving

statements, several months after the incident, there was no evidence that Doe was attempting to hurt Sesser or anyone else on that day<sup>15</sup>

Article 7, Section 9.01 provides that the District shall give the employee notice of the allegations against the employee. Shortly after she received the District's October 25 letter placing her on paid administrative leave, Sesser met with Novotney. Novotney informed her of the allegations that she had stomped on the foot of a student in her class. Novotney also told Sesser the possible outcomes of the investigation, ranging from full reinstatement to dismissal.

The majority contends that this notice was insufficient because Sesser was not *specifically* provided with a copy of Board Policy JGAA. I disagree.

Board Policy JGAA provides that physical force may only be used to restrain a student when the student is physically attacking another person, attempting to or threatening to attack any other person, destroying/damaging property, endangering him/herself, or when it is necessary to remove a student from one location to another.

The policy is available on the District's website. The District informed Sesser that its policies and procedures were on its website and Sesser initialed the checklist indicating she had been informed. The fact that Sesser chose not to educate herself on the District's policies is not an excuse. Sesser is a professional—a certified special education teacher and a mandatory reporter. She knew, or should have known, that it was inappropriate to use unnecessary physical force to restrain a student. The District was not required to specifically give Sesser a written copy of the policy and/or read it to her in order to meet its contractual due process obligation. *See OSEA v. Amity School District*, 15 PECBR 811 (District met due process requirements despite the fact that the District never notified the union or employees of the adoption of a dismissal policy for dishonesty). *Also see Elgin Education Association and Wilson v. Elgin School District*, No. 23, Case No. UP-44-90, 12 PECBR 708, *recons*, 12 PECBR 768 (1991) (Board declined to apply “just cause” standard under terms of contract. However, this Board provided that, had it applied the just cause standard, the District met its due process *notice* obligation despite the fact that there was no specific instruction, published written rule, or policy covering the specific alleged conduct). *Elgin School District*, 12 PECBR at 723 n 11.

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<sup>15</sup>Sesser was given an opportunity to respond to the allegations. At her request, the District agreed to delay Sesser's interview until the completion of her criminal diversion

In addition, Sesser was a trained, certified special education teacher. Granted, she had little experience with children with such severe disabilities. However, any teacher knows, or should know, that it is not appropriate to use physical force against a student except under extreme circumstances.

The majority contends that the lack of evidence that Doe suffered any physical injury is significant. The majority's focus is misplaced. Doe is severely autistic and non-verbal. His communication skills are extremely limited. There was no evidence that he had the facilities to communicate pain or emotional trauma. According to Berglund, the autism specialist, severely autistic children experience trauma and an exaggerated sense of "fight or flight" when they are touched without first receiving a verbal cue.

In addition, this is not a "just cause" case, therefore we do not determine whether Sesser was guilty of child abuse. Our job is to determine whether the District provided Sesser with due process as required by the expired collective bargaining agreement.

The District complied with its contractual due process obligation when it conducted a fair and thorough investigation; notified Sesser of the allegations against her and gave her an opportunity to respond; and based its decision on substantial information that Sesser used unnecessary physical force to restrain Doe at a time when Doe was not a physical threat to Sesser or anyone else.

Sesser was a *probationary* teacher. As such, her "years of experience" do not mitigate in her favor. A teacher who uses unnecessary physical force against any student—especially one as vulnerable as Doe—commits a serious offense. It not only puts the students at risk, but also the District if it continues to employ such a teacher. Therefore, the discipline was proportionate to the offense.

Based on the above reasons, I respectfully dissent.

  
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Vickie Cowan, Board Member