

**STATE OF NEW JERSEY - DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES**

STATE OPERATED SCHOOL DISTRICT OF THE
CITY OF NEWARK

and

Case No. 270-11/13

OPINION
and AWARD

RICHARD BARNES-BEY

Before:

Edmund Gerber, Arbitrator

Appearances:

For the State Operated School District
of the City of Newark:
Arsen Zartarian, Esq.,
Deputy General Counsel, State Operated School District
Of the City of Newark

For the Respondent Richard Barnes-Bey:
Colin Lynch, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman

Richard Barnes-Bey ("Bey") is employed by the State Operated School District of the City of Newark as a tenured teaching staff member. On October 31, 2013 he was charged by the School District with conduct unbecoming a teaching staff member. It is specifically alleged that on March 18, 2013 Bey struck a four year old pre-kindergarten student, Q.G., twice on the buttocks/behind with an open hand, knowingly in the presence of a classroom of students

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Pursuant to N.J.S.A. 18A:6-16, as amended by *P.L. 2012, c, 26* (TEACHNJ) the tenure charges brought against Bey were referred to me for hearing and decision. Hearings were conducted on December 18 and 19, 2013 at which time the parties examined and cross-examined witnesses, introduced evidence and make argument. The parties submitted briefs which were received by January 10, 2013.

BACKGROUND

Bey is a tenured pre-K teacher, certified by the State of New Jersey to teach Pre-K through third grade. He has been employed full-time by the District since 2001 and has taught in Speedway School since 2010. He was a substitute teacher for the District from 1986 until 2001.

TESTIMONY

Mitchell Center is an Assistant Superintendent in the District. He testified that he frequently visits the schools under his supervision and was in Speedway School on March 18, 20013. As was his practice, he was walking the hallways of the school when he overheard what he described as extremely loud yelling coming from a classroom eight to ten feet from him. He heard, "Come to school like a man –got to get a beating like a man." The door to the classroom was closed and as Center opened the door he saw Bey pulling a child, Q.G., out of his chair by the arm and hit him with an open hand hard on his bottom twice. Center described the hits as "aggressive hits". Center demonstrated how hard Bey hit the child by striking a chair; the blows were quite forceful. As Center entered into the classroom he was fifteen feet from Bey and Q.G..

Center believes that child was crying as he came in the classroom; he was definitely crying after he was hit. Center immediately removed the child from the classroom and called one of the schools security guards. He had the guard take the child to the school nurse. The nurse examined the child but did not find any injury.

Center also called Building Principal Atiba Buckman to Bey's classroom. Buckman testified that she did not see the incident but when she arrived at the classroom Center was red faced and talking fast. He appeared angry. Buckman told Bey that he was not to return to the classroom.

Buckman also noted that although a Teacher's Aide is assigned to Bey's classroom there was no aide in his classroom that day. She noted that a *per-diem* aide was normally assigned to the classroom but since *per-diem* are not part of the District's early call-in program for sick leave, Buckman was not aware of the absence. It was up to Bey to notify her if his aide was absent so she could assign a substitute aide for the day, but he never did.

Bey denies that he struck the child. He testified that, on the morning in question, student Q.G. became upset when students were told it was circle time, where all the students gathered and talked. Q.G. was on a computer and didn't want to get off. Q.G. became resistant and according to Bey, he sat by himself and wouldn't join the circle. He became disruptive and grabbed a book and then paints off a shelf. According to Bey, he approached the child, took him by the hand and directed him to the circle. Bey

first testified he said "Be a man today and join the club," as he tapped him on the rear. He did not believe the tap caused pain. Bey claimed he wasn't upset and denied he ever said that he was going to give the child a beating. Bey acknowledged that he is a loud person and can't whisper. He also disputed Buckman's testimony that she didn't know his aide was absent. Bey claimed that that he told Buckman that morning that his aide was absent.

On cross examination Bey seemed confused. At various times Bey said he prompted, nudged, scooted, directed, pushed or tapped the child; he couldn't remember whether G.Q. was sitting or standing and testified that he didn't remember what he said.

Bey pointed out that he applied for and was awarded grants for his classroom to start a garden and volunteered to participate in a jazz program for students on Saturdays.

Three of Bey's co-workers, Nicole Wingate, Donna Charles and Gwen Verner-Jarju all testified that they had worked with Bey in the past and observed that he worked well with children and they did not see him get angry or act inappropriately.

DISCUSSION

The burden of proof is upon the District to prove its charges against Bey and, if so proven, it further must demonstrate that Bey's conduct warrants dismissal.

Center testified that he witnessed the respondent hitting a four year old child on the backside twice with force. Bey has argued that Center was not credible, since he was new on the job and wanted to make an impression. But Center has been Assistant superintendent for almost two years. Center had no reason to fabricate; he did not even know the Respondent. He only went into the classroom because he heard a man's voice loudly threaten a young person or child with a beating. The Respondent further argues that Center must have been exaggerating when he demonstrated the force of the blows administered by Center. But there is no way to judge the accuracy of that demonstration other than other than the consideration of Center's over-all demeanor and testimony. Significantly, there is nothing in Center's testimony to make one doubt that he saw Bey strike Q.G with force. Similarly, I cannot credit the Respondent's argument that if Q.G. were hit as hard as Center described, his feet would have been flung forward. Bey had the child by the arm when he struck him and he struck him above the legs. Q.G.'s legs would have flown forward only if Bey actually struck him directly on the legs.

Although on cross examination Center did, at times, try to spar with Counsel rather than simply answer his questions, overall, Center's testimony was credible.

By contrast, Bey's description of the events is troublesome. He kept changing his account of what happened that day. At first he said Q.G. was sitting; he then said he didn't remember if he was sitting or standing. He was inconsistent as to just what actions he took with the child. Did he scoot him along? Tap him of the rear end? Push him along? He seemed to blame this incident on the lack of a classroom aide and yet claimed that it never happened. If he didn't hit the child, the lack of an aide is not relevant. Bey had ample reason to fabricate; he is facing the loss of tenure. Bey's testimony is not credible.

Bey also argues that Q.G. was examined by the School Nurse following this incident but the nurse did not see any injury or redness. Absent expert medical testimony describing the injury to be expected from blows described by Center, I cannot draw any conclusive inferences from the lack of a visible injury.

Accordingly, I find that the Respondent did strike the four year old Q.G. twice on the behind with force

Although I have no reason to doubt the honesty of Nicole Wingate, Donna Charles and Gwen Verner-Jarju who testified on behalf of Bey, none of them were witness to the event at issue.

Respondent's conduct must be evaluated in accordance with N.J.S.A. 18A:6.1, the statute governing corporal punishment of students, which states:

No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:

- 1) To quell a disturbance, threatening physical injury to others.
 - 2) To obtain possession of weapons or other dangerous objects.
 - 3) For the purpose of self-defense; and
 - 4) For the protection of persons or property;
- and such acts, or any of them shall not be construed to constitute corporal punishment within the meaning and intent of this section. Every school resolution, by law, rule, or ordinance; or other act of authority permitting or authorizing corporal punishment to be inflicted upon a pupil attending a school or educational institution shall be void.

There is no basis to find that Bey's conduct was justified under one of the exceptions stated in N.J.S.A. 18A:6.1. His conduct constituted conduct unbecoming a teaching staff member and warrants discipline.


Bey argues that even if his conduct warrants disciplinary action, the penalty of removal is disproportionate to the offence and cites several cases involving corporal punishment where the courts found that removal was not

warranted. In re Nogaki, 84 S.L.D.; 1986, Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct, 1943); In re Harrell, 179 S.L.D. 479; In re Williams 82 S.L.D. 1594; Board of Education, City of New Brunswick, 92 N.J.A.R.2d (EDU) 527 (N.J. Adm.), 1992 WL 368095. Redcay stands for the proposition that one incident of corporal punishment should be balanced against a career of teaching and here Bey has been a full time teacher for twelve years, However, none of the cited cases were factually similar to the instant matter. None of the cases involved such a young child, four years old, who was subjected to physical force to maintain discipline See, In re Fulcomer, 93 N.J. Super. 404; (App. Div. 1967). Nor did the cases involve a teacher who refused to acknowledge or take responsibility for his or her action. The Court in In re Tenure Hearing of Parezo, School District of the Borough of Lakehurst, Ocean County, Dkt. No. A-1442-11T3 (Aug. 28, 2013) noted the seriousness of a teacher's failure to take responsibility for his or her actions. Such a disturbing attitude leaves open the prospect that a teacher returned to the classroom may perpetuate such conduct. Bey has exhibited a similar disturbing attitude. The District, by clear and convincing evidence, has established that Bey struck Q.G, yet Bey continued to deny he struck the child. As in Parezo, Bey's disturbing attitude leaves open the possibility that his unacceptable conduct would be repeated.

Richard Barnes-Bey conduct, in striking a four year old child in class, coupled with his refusal to take responsibility for his own actions, leads me to conclude that his removal from the District is warranted.


AWARD

the State Operated School District of the City of Newark has met its burden of proving the charge that Richard Barnes-Bey engaged in unbecoming conduct when he twice struck a student with an open hand and that this charge warrants dismissal. The charge is sustained.



Edmund Gerber, Arbitrator
January 22, 2014

I, Edmund Gerber, affirm that I have executed this document as my Award in Department of Education Docket No. Case No. 270-11/13 on Wednesday, January 22, 2014.



Edmund Gerber, Arbitrator
January 22, 2014