

ANTONIA PADILLA, Petitioner,	§	BEFORE THE
	§	
v.	§	COMMISSIONER OF EDUCATION
	§	
ALICE INDEPENDENT SCHOOL DISTRICT,	§	
Respondent.	§	THE STATE OF TEXAS

DECISION OF THE COMMISSIONER

STATEMENT OF THE CASE

Petitioner Antonia Padilla appeals from Respondent Alice Independent School District’s decision to nonrenew her term contract. Adrienne Butcher is the Administrative Law Judge appointed by the Commissioner to hear this case. Petitioner is represented by its counsel, Matthew Manning, of Webb, Cason & Manning, P.C., in Corpus Christi, Texas. Respondent is represented by its counsel, D. Craig Wood and Katie E. Payne, of Walsh, Gallegos, Treviño, Kyle & Robinson, P.C., in San Antonio, Texas.

In three issues, Petitioner argues that (1) the board’s decision is unsupported by substantial evidence; (2) over Petitioner’s objection, the presiding judge at her nonrenewal hearing¹ improperly admitted a prejudicial, non-probative letter to Respondent from a disability advocacy group, which she contends was also based on hearsay; and (3) during the hearing, the presiding judge inconsistently applied the Texas Rules of Evidence, making the hearing “manifestly unjust.” Petitioner asks the Commissioner to reverse the board’s decision and instruct it to renew her contract for the 2023–2024 school year. Respondent denies that Petitioner is entitled to relief and argues that (1) Petitioner had no reasonable belief that the force she used on students was necessary, as required for statutory immunity, and substantial evidence supports one or more of its nonrenewal reasons; (2) the disability advocacy group’s letter was not hearsay, was probative on

¹ Respondent conducted the hearing pursuant to its Policy DFBB (Local), with the board president serving as the presiding officer over the hearing.

a nonrenewal reason, and was admissible in an administrative proceeding; and (3) Petitioner failed to show a manifest injustice. For the reasons stated herein, Petitioner’s appeal is denied.

FINDINGS OF FACT

After due consideration of the record and matters officially noticed, it is concluded that the following Findings of Fact are established by the record and file in this case in accordance with 19 Tex. Admin. Code § 157.1072(i):

1. Petitioner had a term employment contract with Respondent for the 2022–2023 school year. Petitioner’s contract required her “to comply with all Board and District directives, state and federal laws and rules, and District policy and regulations.”

2. Respondent assigned Petitioner to a classroom with approximately nine early childhood special education students, most of whom were nonverbal, whose ages ranged from three to six years. Petitioner had two teaching assistants assigned to her classroom.

3. Respondent’s Policy DH (Local) requires all employees to perform their duties in accordance with state and federal law, district policy, and ethical standards, and it adopts the Educator’s Code of Ethics. Respondent also has a student discipline policy, contained in Policies FO (Legal) and (Local), that addresses use of force and prohibits aversive techniques, as provided in Texas Education Code § 37.0023.

4. In September 2021, Petitioner completed twelve hours of Nonviolent Crisis Intervention training.

5. On September 7, 2022, in addressing a parent’s report that Petitioner had harmed a student, administrators reviewed video recordings from Petitioner’s classroom and found several interactions by Petitioner with students that concerned them. Consequently, on September 8, 2022, administration placed Petitioner on paid administrative leave and opened an investigation.

6. In November 2022, Respondent’s administration received a letter requesting information and documents from Disability Rights Texas, an advocacy group for individuals with disabilities. The letter referenced seven students, all of whom were Petitioner’s students.

7. In March 2023, the local county attorney's office issued three criminal complaints against Petitioner for assault against a disabled individual, based on Petitioner's alleged actions regarding one of her students.

8. On April 10, 2023, Respondent's board of trustees voted to propose Petitioner's term contract for nonrenewal. By April 13, 2023 letter, Respondent notified Petitioner of that vote.

9. After Petitioner requested a board hearing on her proposed nonrenewal, Respondent emailed Petitioner an April 19, 2023 supplemental notice letter stating the hearing's date and time, as well as ten enumerated nonrenewal reasons under Respondent's Policy DFBB (Local), which is in the local record. The nonrenewal bases included:

1. Failure to fulfill duties or responsibilities;
2. Incompetency or inefficiency in the performance of duties;
3. Failure to comply with Board policies or administrative regulations;
4. Failure to meet the District's standards of professional conduct;
5. Any activity, school-connected or otherwise, that, because of publicity given it, or knowledge of it among students, faculty, or the community, impairs or diminishes the employee's effectiveness in the District;
6. Any breach by the employee of an employment contract or any reason specified in the employee's employment contract;
7. Behavior that presents a danger of physical harm to a student or to other individuals;
8. Assault on a person on District property or at a school-related function, or on an employee, student, or student's parent regardless of time or place;
9. Any reason that makes the employment relationship void or voidable, such as a violation of federal, state, or local law; and
10. Any reason constituting good cause for terminating the contract during its term.

The April 19, 2023 letter also stated the following factual bases for nonrenewal:

In August and September of 2022, on multiple occasions, you used unreasonable physical force and prohibited aversive techniques with young special education students in your classroom . . . , which is supported by video of the incidents, which you have been given the opportunity to view at the District administration offices. Three criminal complaints for assault against elderly or disabled individual have been filed against you for three separate incidents regarding [an individual student] . . . in your classroom. Parents of your students have complained about your use of force and aversive techniques with students and shared their concerns for their children's safety while in your classroom.

10. On April 26, 2023, the board held a hearing on Petitioner's proposed nonrenewal. After the hearing, the board unanimously voted to nonrenew Petitioner's term contract.

11. Petitioner timely filed a petition for review with the Commissioner.

DISCUSSION

Briefing requirements

The Commissioner has adopted briefing rules that govern the format for briefs submitted for hearings, including hearings under Texas Education Code, Chapter 21. *See* 19 Tex. Admin. Code § 157.1058. The rules provide, in relevant part:

(3) Statement of facts. The brief must state concisely *and without argument* the facts pertinent to the issues or points presented. The commissioner will accept as true the facts stated unless another party contradicts them. The statement must be supported by record references.

(4) Argument. The brief must contain clear and concise argument for the contentions made with appropriate citations to authorities and to the record.

19 Tex. Admin. Code § 157.1058(a)(3)–(4) (emphasis added).

Petitioner submitted a brief with a merged statement of facts and argument labeled, “Statement of Facts and Argument.” Pet.’s Br. at 2–3. Rule 157.1058’s distinction of these two sections reflects their discrete purposes and helps the Commissioner discern a party’s nonargumentative facts from its argument. This is particularly important in Chapter 21 appeals, which are short timeline cases that the Commissioner must decide within thirty days of the school district’s deadline to respond to the petition for review. *See Booker v. Houston Indep. Sch. Dist.*, No. 016-R2-12-2020 (Comm’r Educ. 2021). Although Petitioner improperly merged her statement of facts and argument sections, the merged section totals two pages, and the argument is ascertainable. Accordingly, Petitioner’s merged statement of facts and argument will be construed in this appeal as her argument.²

Substantial evidence standard of review

In term contract nonrenewal matters, a school board may nonrenew a teacher’s contract for a pre-established nonrenewal reason under its adopted policies. *See* Tex. Educ. Code § 21.203(b). Parties may appeal school boards’ nonrenewal decisions to the Commissioner, who conducts what the Texas Supreme Court describes as a “limited review” of the decision, based on the local record

² Although in this case, Petitioner’s argument can be ascertained, that is due in part to its relative brevity and may not apply to other appeals. Parties proceeding before the Commissioner should comply with his briefing rules. *See generally* 19 Tex. Admin. Code ch. 157, subch. AA.

established before the board and, if applicable, before the independent hearing examiner. *See N.E. Indep. Sch. Dist. v. Riou*, 598 S.W.3d 243, 250–51 (Tex. 2020). In an appeal of a school board’s nonrenewal decision, the Commissioner may not substitute his judgment for the board’s unless it was arbitrary, capricious, or unlawful or unsupported by substantial evidence. *See Tex. Educ. Code § 21.303(a)*. Substantial evidence is not a high standard; it means more than a mere scintilla of evidence, regardless of the countering evidence’s comparative weight. *See Reincke v. Richardson Indep. Sch. Dist.*, No. 063-R1-0607 (Comm’r Educ. 2007) (citing *Mireles v. Tex. Dep’t of Pub. Safety*, 9 S.W.3d 128, 131 (Tex. 1999)). If substantial evidence supports one or more of the school district’s nonrenewal reasons, then the Commissioner must sustain its decision. *Steans v. Manor Indep. Sch. Dist.*, NO. 081-R1-08-2014) (Comm’r Educ. 2014).

Evidence of actual harm not required

In her first issue, Petitioner argues that Respondent presented no evidence to the board that she had actually harmed any students by using unreasonable force. Pet.’s Br. at 1–2. According to Petitioner, one witness only speculated that students “could have” been harmed by her actions, and the witness conceded that students’ crying could have been caused by reasons other than pain from being lifted by their shirts. Pet.’s Br. at 2. She also argues, “None of the other witnesses ever provided any evidence that the children in question had once been harmed by [her] transportation techniques.” *Id.* However, Respondent was not required to prove actual harm to students. One of Respondent’s nonrenewal reasons included “behavior that presents a *danger of physical harm* to a student or to other individuals.” (emphasis added). This appeal addresses whether substantial evidence supports one or more of Respondent’s nonrenewal reasons, none of which require evidence of actual harm to students.

Substantial evidence supports the board’s decision

At the April 26, 2023 nonrenewal hearing, Respondent presented several witnesses and videos of Petitioner’s conduct with students to support its enumerated nonrenewal reasons. Anna Holmgreen, Respondent’s executive director of human resources, testified that she and other administrators reviewed the classroom videos after a parent reported that Petitioner had hurt a

student's arm. Their review led them to discover videos of other incidents that concerned them, including Petitioner lifting students from the floor by their shirts, dragging or carrying students by their shirts, pushing students, and handling students aggressively. The administration placed Petitioner on paid administrative leave and began investigating the incidents. Ms. Holmgreen also testified that four parents, what she considered a high number, had expressed concerns about Petitioner's safety with students and had asked to view classroom videos. She testified that consequently, she did not believe Petitioner could be effective in the classroom.

Javier Garcia, a special education specialist, testified that he had fifteen years of experience in early childhood education and, based on his review of the classroom videos, Petitioner's conduct was "not safe," "could be dangerous," and did not comply with Respondent's training and policies. He further testified that lifting students by the necks of their shirts put pressure on their necks and appeared to hurt at least one student, whose crying increased when Petitioner lifted him by his shirt.

Grace Perez, Petitioner's campus principal, testified that Petitioner could not be effective in the classroom because the classroom videos revealed ethics violations. Dr. Carl Scarbrough, the superintendent who recommended Petitioner's nonrenewal, testified that the classroom videos showed Petitioner used improper techniques that "put kids in a dangerous and an unsafe position" and endangered their mental and physical health. He further testified that her conduct violated board policies, district professional standards, and Standard 3.2 of the Educators' Code of Ethics. Dr. Scarbrough testified that he believed Petitioner's effectiveness would be diminished because parents would not trust her with their children.

Petitioner also testified, acknowledging that her conduct "looks ugly, I know," and that it would be "uncomfortable" to students, although she did not intend to harm them, suffered from back pain, and was overwhelmed in her classroom. She acknowledged her conduct was "not okay. . . . I know that. But I didn't know how else to move these kids."

Respondent's hearing evidence also included several classroom videos and its policies regarding employee standards of conduct and student discipline. Both state law and board policy

prohibit use of aversive techniques, which include “any technique or intervention” that impairs a student’s breathing, including “applying pressure to the student’s torso or neck.” *See* Tex. Educ. Code § 37.0023(7)(A). In addition, Respondent presented evidence that Petitioner’s conduct against one student led to criminal complaints against her, that the allegations against her had gained notoriety, and that parents did not trust her with their children.

Substantial evidence is not a high standard, and the analysis is whether it supports one or more nonrenewal reason, not whether it outweighs contrary evidence, including Petitioner’s explanations that she was overwhelmed, suffered from back pain, and did not intend any harm. In this case, there is more than a scintilla of record evidence to support one or more of Respondent’s findings that Petitioner, through the conduct describe above, (1) failed to fulfill her duties and responsibilities; (2) performed her duties incompetently or inefficiently; (3) failed to comply with board policies or ethics rules; (4) failed to meet Respondent’s standards of professional conduct; (5) had diminished effectiveness in the district; (6) breached her contract provisions requiring her to comply with district policy and state law; (7) presented a danger of physical harm to students; (8) assaulted students through inappropriate and offensive touching; (9) and otherwise made her continued employment void or voidable.³

Aside from addressing Respondent’s nonrenewal reason number 7 in her brief, regarding behavior that presents a danger of physical harm to students, Petitioner presented no argument on the remaining nonrenewal reasons. She fails to show that substantial evidence did not support the board’s decision or that it was arbitrary and capricious.

Section 22.0512 immunity

Respondent argues that Petitioner had no reasonable belief that using physical force on students was necessary under Texas Education Code § 22.0512. Although Petitioner did not raise § 22.0512 in her brief, Respondent briefed this issue, which will be addressed.

³ Although Respondent did not pursue termination during the school year, substantial evidence may also have supported good cause for termination, which is the tenth nonrenewal basis. The good cause issue is not decided here, as substantial evidence supports other nonrenewal bases.

Section 22.0512 provides immunity from disciplinary proceedings for professional employees who use physical force against students, providing, in relevant part:

(a) A professional employee of a school district may not be subject to disciplinary proceedings for the employee's use of physical force against a student to the extent justified under Section 9.62, Penal Code.

(b) In this section, "disciplinary proceeding" means:

(1) an action brought by the school district employing a professional employee of a school district to discharge or suspend the employee or terminate or not renew the employee's term contract; or

...

Tex. Educ. Code § 22.0512. Section 9.62 provides,

The use of force, but not deadly force, against a person is justified:

(1) if the actor is entrusted with the care, supervision, or administration of the person for a special purpose; and

(2) when and to the degree the actor reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group.

Tex. Penal Code § 9.62. The Commissioner recently addressed the "reasonable belief" standard, finding that it is an objective standard, yet viewed from the teacher's perspective. *See Stoneham v. Crowley Indep. Sch. Dist.*, No. 036-R2-04-2022 (Comm'r Educ. 2022). A school district has the burden of showing that an employee's use of force was not reasonable. *Id.* Respondent, following the Commissioner's *Stoneham* analysis, argued that under the nonexclusive *Hogenson*⁴ factors, Petitioner's use of force was unreasonable. The *Hogenson* factors include:

(a) The age, sex, and condition of the child,

(b) The nature of [the child's] offense or conduct and [the child's] motives,

(c) The influence of [the child's] example upon other students,

(d) Whether the force was reasonably necessary to compel obedience to a proper command, and

(e) Whether the force was disproportionate to the offense, is unnecessarily degrading, or is likely to cause serious injury.

Id.

In applying these factors, it is highly relevant that Petitioner's students were special needs students who ranged from three to six years old and were acclimating to a new school environment. Most were nonverbal and thus unable to verbally report mistreatment or injuries to parents or other care providers. In the videos, the students against whom Petitioner used physical force were often

⁴ *Hogenson v. Williams*, 542 S.W.2d 456, 459–60 (Tex. Civ. App.—Texarkana 1972, no writ).

sitting alone on the floor, sitting at desks, or napping and were not creating a risk of harm to themselves or others, influencing other students, or otherwise engaging in conduct requiring immediate transportation or intervention. Moreover, it is degrading for students to be lifted, pulled, or carried by their shirts; pushed out of chairs; and pulled or yanked by their arms. These actions risked injuring students and were noncompliant with Petitioner's policies and training, as well as state law and ethics standards. Viewed objectively but from Petitioner's perspective, substantial evidence supports a finding that Petitioner did not reasonably believe the force she used, as described above, was necessary. Therefore, substantial evidence supports a finding that she was not entitled to § 22.0512 immunity.

Petitioner's first issue is overruled.

Disability Rights Texas letter.

In her second issue, Petitioner argues that the presiding judge in her nonrenewal hearing erroneously admitted the letter to Respondent's administrators from Disability Rights Texas, an organization advocating for Texas individuals with disabilities. Petitioner argues that the letter contained hearsay and "undoubtedly had a deleterious effect" on the board by giving "undue credence to [CPS] allegations that had already been ruled out."

Respondent argues that the letter was also not hearsay because it was not offered for the truth of the matters asserted but to show administrators' awareness of the community's knowledge of the allegations against Petitioner. This related to her ability to be effective in the classroom, as one of the nonrenewal reasons was for "[a]ny activity, school-connected or otherwise, that, because of publicity given it, or knowledge of it among students, faculty, or the community, impairs or diminishes the employee's effectiveness in the District." The letter was evidence supporting this nonrenewal reason and was admitted for that purpose.

Alternatively, Respondent argues that the letter was admissible under the Commissioner's analysis in *Vasquez v. Los Fresnos Indep. Sch. Dist.*, No. 062-R1-07-2013 (Comm'r Educ. 2013).

In *Vasquez*, the Commissioner found that, unlike nonrenewal proceedings before independent hearing examiners, the Texas Rules of Evidence do not directly apply to nonrenewal

proceedings before the school boards, except where specifically adopted. *Id.* Respondent asserts that its board has not adopted the Texas Rules of Evidence for nonrenewal proceedings. The hearing procedures in Policy DFBB (Local), contained in the record, do not adopt the Texas Rules of Evidence.

In *Vasquez*, the Commissioner applied the Administrative Procedure Act’s liberal evidentiary rule applicable to contested cases. *See id.*; Tex. Gov’t Code § 2001.081. Under that standard, evidence that would otherwise be inadmissible in court proceedings may be admitted if (1) necessary to ascertain facts not reasonable susceptible of proof under those rules; (2) not precluded by statute; and (3) of a type on which a reasonably prudent person commonly relies in the conduct of the person’s affairs. *See Tex. Gov’t Code § 2001.081.* Respondent argues that it lacks subpoena power over Disability Rights Texas, the letter’s admission is not statutorily precluded, and the letter was evidence on which a reasonably prudent person would rely in conducting the person’s affairs.⁵

Petitioner does not show the presiding judge abused his discretion in admitting the letter, which was probative of one of the nonrenewal reasons, or that the liberal evidentiary standard was inapplicable to her nonrenewal hearing. Accordingly, her second issue is overruled.

Manifest injustice

Petitioner presents her third issue in one paragraph:

Finally, the Texas Rules of Evidence—determined not to apply at the beginning of the hearing, except to evidentiary matters—were so inconsistently applied that it rendered the hearing manifestly unjust. The record is replete with instances where the Judge—here, the Board president, as advised by one of the District’s lawyers acting as hearing officer—vacillated between application of the Rules and nonapplication thereof. This vacillation created an environment wherein Ms. Padilla’s nonrenewal hearing was manifestly unjust considering the virtual toss-up which occurred on each objection proffered by both counsel. A.I.S.D. L.R., *passim*.

Pet.’s Br. at 3.

Despite arguing that the record is “replete” with examples of inconsistent application of the Texas Rules of Evidence, Petitioner provides no examples of inconsistent rulings but instead

⁵ The Third Court of Appeals affirmed the Commissioner’s decision. *See Los Fresnos Consol. Indep. Sch. Dist. v. Vasquez*, 481 S.W.3d 742 (Tex. App.—Austin 2015, pet. denied).

provides only a “passim” citation to the entire local record. Argument to the Commissioner must be clear and concise, with appropriate citations to authorities and the record for the contentions made. *See* 19 Tex. Admin. Code § 157.1058(a)(4). A “passim” citation alone is not appropriate support for an appellate issue. It is neither the Commissioner’s nor an opposing party’s responsibility to scour a record to construct support for arguments a party might have briefed. *See Booker v. Houston Indep. Sch. Dist.*, No. 016-R2-12-2020 (Comm’r Educ. 2021). Petitioner waived this argument by failing to adequately brief it. *See* 19 Tex. Admin. Code § 157.1058(a)(4).⁶ Her third and final issue is overruled.

CONCLUSIONS OF LAW

After due consideration of the record, matters officially noticed, and the foregoing Findings of Fact, in my capacity as Commissioner of Education, I make the following Conclusions of Law:

1. The Commissioner has jurisdiction over this case under Texas Education Code § 21.301.
2. Respondent was not required to prove actual harm to Petitioner’s students to support its nonrenewal reasons stated in its April 19, 2023 supplemental notice letter to Petitioner. *See* Tex. Educ. Code § 21.203(b).
3. Substantial evidence supports a finding that Petitioner is not entitled to immunity under Texas Education Code § 22.0512. *Stoneham v. Crowley Indep. Sch. Dist.*, No. 036-R2-04-2022 (Comm’r Educ. 2022).
4. Substantial evidence supports one or more of Respondent’s stated policy reasons to nonrenew Petitioner’s term contract.
5. The Disability Rights Texas letter was not inadmissible in the nonrenewal hearing. The letter was not admitted for the truth of the matters asserted therein but because it was probative

⁶ Even without waiver, Petitioner fails to show any inconsistent application of the Rules of Evidence. The record reflects that the presiding judge ruled on both parties’ objections where needed. In presenting her case to the board, Petitioner’s counsel made approximately a dozen objections, most of which were to the form of Respondent’s counsel’s questions. Respondent’s counsel rephrased or withdrew over half of those questions. Of her approximately four remaining objections that the judge overruled, Petitioner does not address whether he applied evidentiary rules or how any error likely led the board to an erroneous decision.

of her allegations' publicity and, consequently, her effectiveness as a teacher. The Disability Rights Texas letter was also admissible under the liberal evidentiary standards applicable to board nonrenewal hearings. *Vasquez v. Los Fresnos Indep. Sch. Dist.*, No. 062-R1-07-2013 (Comm'r Educ. 2013). Petitioner did not show an abuse of discretion in admitting the letter.

6. Petitioner waived her argument about inconsistent application of the Texas Rules of Evidence by failing to adequately brief it and by supporting it with one "passim" citation to the entire local record, which is not appropriate support for an entire issue. 19 Tex. Admin. Code § 157.1058(a)(4); *Booker v. Houston Indep. Sch. Dist.*, No. 016-R2-12-2020 (Comm'r Educ. 2021).

7. Petitioner's appeal is denied.

ORDER

After due consideration of the record, matters officially noticed, and the foregoing Findings of Fact and Conclusions of Law, in my capacity as Commissioner of Education, it is hereby ORDERED that the Petitioner's appeal be, and is hereby, DENIED.

SIGNED AND ISSUED this 30th day of June 2023.



MIKE MORATH
COMMISSIONER OF EDUCATION