NUMBER 13-18-00408-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

EDINBURG CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, Appellant,

v.

DANIEL VILLARREAL AND MIKE MORATH, IN HIS OFFICIAL CAPACITY AS TEXAS COMMISSIONER OF EDUCATION, Appellees.

On appeal from the 93rd District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Hinojosa
Memorandum Opinion by Justice Benavides

This is an appeal from the trial court's judgment affirming administrative proceedings that terminated a teacher's term employment contract. Appellant, the Edinburg Consolidated Independent School District (ECISD), challenges the decision of the Commissioner of Education for the State of Texas, Mike Morath, requiring ECISD to

reinstate Daniel Villarreal to his teaching position or pay out his contract. Both the Commissioner and Villarreal are appellees.

ECISD raises two issues: (1) whether teacher immunity from the use of physical force in § 22.0512 of the education code prevents Villarreal's contract from being terminated for conduct that violates the district's corporal punishment policies; and (2) when a teacher's conduct does not violate the corporal punishment policy of the district, whether § 22.0512 provides immunity if the teacher's conduct is objectively unreasonable. *See* TEX. EDUC. CODE ANN. § 22.0512.

We reverse and render judgment in favor of ECISD.

I. BACKGROUND

Villarreal worked as an elementary school teacher at JFK Elementary School in ECISD during the 2015–16 school year; he was in the first year of a two-year contract. On May 2, 2016, ECISD issued a notice of proposed termination of Villarreal's contract and set forth four allegations of unnecessarily rough treatment of students.

A. The Statutory Scheme

After a teacher receives notice of a proposal to terminate a term contract, the teacher may request a hearing by notifying the board of trustees. *See id.* §§ 21.206, 21.207. The hearing must be held in accordance with the board's rules. *Id.* § 21.207(b). The board may use an independent hearing examiner (IHE) or may conduct the hearing itself. *See id.* The hearing is evidentiary and resembles a bench trial. *See id.* § 21.255, 21.256. At the conclusion of the hearing, the IHE issues a written recommendation that includes findings of fact and conclusions of law and may include a proposal for granting

relief. *See id.* § 21.207(b-1), (c). The board may accept, reject, or modify the IHE's recommendation and shall notify the teacher of the board's decision in writing within fifteen days of its decision. *Id.* § 21.207(b-1).

A teacher who is dissatisfied with the board of trustee's decision may appeal to the Commissioner of Education. *See id.* § 21.301. The appeal to the Commissioner is decided based solely on the local record and the Commissioner may not consider "any additional evidence or issue." *Id.* § 21.301(c).

> If the board of trustees terminated a teacher's probationary, continuing, or term contract during the contract term or suspended a teacher without pay, the commissioner may not substitute the commissioner's judgment for that of the board unless:
>
> > (1) if the board accepted the hearing examiner's findings of fact without modification, the decision is arbitrary, capricious, or unlawful or is not supported by substantial evidence . . . .

Id. § 21.303(b). The Commissioner's decision must be in writing and must include findings of fact and conclusions of law. *Id.* § 21.304(a). [1] Either party may appeal the Commissioner's decision to a district court. *Id.* § 21.307.

B. The Hearing

Villarreal requested a hearing on the notice of proposed termination which was held before an IHE. The facts recited below are taken from the findings of fact made by

[1] Neither the Board nor the Commissioner may make new fact findings, but they may reject or modify findings of fact by the IHE if not supported by substantial evidence. *See* TEX. EDUC. CODE ANN. §§ 21.257(a), 21.259(b), 21.303(b). The Commissioner also reviews the board's decision regarding the IHE's findings of fact as described in § 21.303. *See id.* § 21.303(b); *Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 564 (Tex. 2000) (holding that the board may not find facts in addition to those found by the IHE); *Miller v. Hous. Consol. Indep. Sch. Dist.*, 51 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (describing the process of review of the hearing examiner's findings of facts).

the IHE and accepted by the board of trustees.

1. Student One

In November 2015, Villarreal walked up to a male fifth-grade student (Student One) in his class who was talking right before a benchmark test was to begin and shouted, "I thought I told you to shut up!" He then grabbed the student by the shoulder and shook him "real hard" according to Student One. On December 8, 2015, Student One was talking in class when Villarreal told him that if he misbehaved one more time, he would call Student One's mother to come pick him up. Student One told Villarreal to call his mother because Student One did not like the way Villarreal was getting mad at them and had roughly grabbed Student One and another male student earlier that day. Student One's mother later complained to the principal.

2. Student Two

In November 2015, a student passed pens to another male fifth-grader (Student Two) who did not see them. The pens fell, causing noise. When Student Two bent down to retrieve the pens, Villarreal pushed him out of the way and Student Two hit his shoulder on Villarreal's knee.

On December 8, 2015, Student Two continued clapping in class after everyone else stopped and after Villarreal told him to stop clapping. Villarreal took Student Two out of the classroom into the hallway, pushed him up into the wall after the security guard passed, and talked to him about his conduct.

Student Two was also involved in an incident after school in which the students were stacking their chairs, but Student Two decided to sit in the stack. Other students

stacked two chairs on him before Villarreal grabbed Student Two and pushed him to the floor. Student Two hit his head on the chalkboard tray but did not have a scratch or bruise.

3. Student Three

Student Three, another fifth-grade boy, was talking to other students in the hallway between classes during the Fall term of the 2015–16 school year. Villarreal placed his hands on Student Three's shoulders and pressed his thumbs down which caused pain. Villarreal had done the same thing to Student Three on two other occasions. Other students witnessed these incidents. None of the involved students were under a behavioral plan.

4. 2012 Reprimand

In 2012, Villarreal was reprimanded for using force against a second-grade boy who had thrown a second-grade girl to the ground and was about to hit her with a closed fist. Villarreal lifted the boy and removed him from the girl's vicinity, bent the boy's wrist and applied pressure to the wrist and neck, as he said he had been trained to do. Principal Rosa Bernal investigated the incident and the training that Villarreal referenced. She learned from the training instructor that Villarreal's use of neck area pressure and bending the child's wrist was improper. Bernal reprimanded Villarreal and advised him that his action violated "the Code of Ethics and Standard Practices of Education 3.5 'The Educator shall not intentionally, knowingly, or recklessly engage in physical mistreatment, neglect, or abuse of a student or minor.'" Villarreal was directed "to cease this type of disciplinary

action immediately."

5. Student Discipline Policy at JFK Elementary

Under the current principal, Nelda Gaytan, teachers at JFK are trained in classroom management that includes progressive discipline: (1) a verbal warning; (2) if the problem continues, proximity is applied; (3) the student is taken out of class and the teacher will have a talk with the student; and (4) the student is sent to the office. At the JFK campus, the only time force or physical restraint is used for discipline is if parental permission is obtained and if a child is harming himself or others. Principal Gaytan has emphasized a no touch or physical force policy to the staff to avoid allegations of sexual harassment.

6. Findings of Fact and Conclusions of Law

The IHE found that:

- Villarreal violated the Educator's Code of Ethics Standards 3.2, 3.5, and 3.8;[2]
- Villarreal's rough disciplinary action of Students One, Two and Three adversely affected their learning, physical health, mental health, or safety;
- Villarreal failed to comply with the 2012 written reprimand/directive when he continued to use physical force on students;
- Villarreal did not have an objectively reasonable belief that his use of force was necessary to discipline students;

[2] The Educator's Code of Ethics Standard 3.2 states that an educator "shall not intentionally, knowingly, or recklessly treat a student or minor in a manner that adversely affects or endangers the learning, physical health, mental health, or safety of the student or minor." *See* 19 TEX. ADMIN. CODE § 247.2(3)(B). Standard 3.5 prohibits an educator from intentionally, knowingly, or recklessly engaging "in physical mistreatment, neglect, or abuse of a student or minor." *See id.* § 247.2(3)(F). Standard 3.8 requires an educator to "maintain appropriate professional student educator-relationships and boundaries based on a reasonably prudent educator standard." *See id.* § 247.2(3)(H).

- Villarreal's subjective belief that his use of force was necessary to discipline students was unreasonable based upon his 2012 discipline; and

- The child witnesses were credible.

The IHE also concluded that:

- The standard to be met to terminate Villarreal's contract was "good cause."

- Villarreal was not entitled to immunity from discipline pursuant to § 22.0512 because his prior reprimand from 2012 precluded any belief that his use of physical force was subjectively or objectively reasonable [3] *See id.* § 22.0512.

- Villarreal violated ECISD school board policy and the Educator Code of Ethics §§ 3.2, 3.5, and 3.8.[4]

The IHE recommended that Villarreal's contract be terminated. The ECISD Board of Trustees adopted the IHE's findings of fact and conclusions of law, and it accepted the recommendation to terminate Villarreal's term contract. *See id*. § 21.259.

C. The Commissioner's Decision

Villarreal appealed the decision terminating his contract to the Commissioner. The Commissioner rendered a decision in Villarreal's favor on October 6, 2016, concluding that Villarreal's conduct was privileged pursuant to § 22.0512. *See id.* §§ 21.304, 22.0512. The Commissioner adopted and incorporated the IHE's findings of fact that were all adopted by the ECISD Board of Trustees. The Commissioner, however, rejected the ECISD Board of Trustees' adoption of most of the IHE's conclusions of law. *See id.* § 21.303(a). In particular, after reviewing the law on teacher immunity, the Commissioner

[3] Conclusions of Law 8 and 9.

[4] Conclusions of Law 11, 12, and 13.

concluded that the ECISD Board's decision was arbitrary and capricious because the ECISD Board failed to measure Villarreal's conduct against an appropriate legal standard, such as the Restatement (Second) of Torts or the *Hogenson* factors. *See Hogenson v. Williams*, 542 S.W.2d 456, 459–60 (Tex. App.—Texarkana 1976, no writ) (citing RESTATEMENT (SECOND) OF TORTS §§ 147, 150, 151, 155). Importantly, the Commissioner found that the Board's conclusions "that because [Villarreal] had been reprimanded for improperly using physical force years ago that he could not have had a reasonable belief that his current use of force was proper" and "[t]hat someone believed [Villarreal] previously used improper force does not prove that [Villarreal] recently used improper force" were arbitrary and capricious. The Commissioner found that Finding of Fact 30[5] formed the basis for Conclusion of Law 9.[6]

> The similarity of this Finding of Fact and this Conclusion of Law indicate that whether a professional employee has an objectively reasonable belief can be a mixed question of fact and law. In the present case, the dispute is not over the facts, but over the legal standard hence, the determination of whether [Villareal] had an objectively reasonable belief is principally a question of law not a question of fact. As [the Board] applied an invalid legal rationale, it is determined that [Villarreal] had an objectively reasonable

---

[5] Finding of Fact 30 states that:

> Mr. Villarreal did not have an objectively reasonable belief that his use of force was necessary to discipline students by yelling, grabbing shoulders, shaking, or pushing student[sic] to the ground and wall during the 2015 -2016 school year. To the extent that Mr. Villarreal actually believed physical force was necessary, his subjective belief was not a reasonable one in light of his prior disciplinary history.

[6] Conclusion of Law 9 states:

> Immunity under Texas Education Code section 22.0512 does not cover Mr. Villarreal's actions in this case because while Mr. Villarreal may have had a subjective belief that the force used was necessary to enforce compliance with proper commands and to maintain discipline in the classroom, this belief was not an objectively reasonable belief because of his prior reprimand/directive from 2012.

> belief that force was necessary. While [Villarreal] did not specifically challenge finding of fact No. 30 and Finding of Fact No. 30 is not changed, Finding of Fact No. 30 should be understood as affirming the facts that [the Board] relied upon in determining whether [Villareal] had an objectively reasonable belief.

The Commissioner relied on Conclusion of Law 9 in part for his conclusion that the Restatement (Second) of Torts factors were not used to determine that Villarreal lacked an objectively reasonable belief that force was necessary. The Commissioner then considered Findings of Facts 13–18, which provided context as to the use of force that was the subject of the 2012 reprimand and concluded that they also "fail[ed] to illuminate [the Board]'s standard for believing [Villarreal] used excessive force." "[T]he Board's Decision does not explain how the previous reprimand shows that [Villareal's] actions in the present case were unreasonable." The Commissioner noted there was "little similarity between the recent use of force and the previous use of force." The Commissioner went on to conclude:

> Taking into consideration all of the relevant Findings of Fact, the Board's Decision to terminate [Villarreal]'s contract is arbitrary and capricious because [the Board] did not use the standard set out in the Restatement of Torts, Second Edition or another valid standard to conclude that [Villareal] did not have an objectively reasonable belief that force was necessary.
> . . .
>
> As [Villarreal]'s conduct is privileged, [the Board's] termination of his contract is arbitrary and capricious.

The trial court affirmed the Commissioner's decision by order dated January 23, 2018. *See id.* § 21.307. This appeal arises from that order. Villarreal also brought several affirmative claims against ECISD, but those claims were severed. Thus, the present appeal concerns only the legal question of whether Villarreal's conduct was privileged

pursuant to § 22.0512. *See id.*

II. PRIVILEGED CONDUCT UNDER § 22.0512

ECISD's first issue challenges the Commissioner's decision that § 22.0512 prohibits ECISD from terminating Villarreal's contract. *See id*. § 22.0512(c). ECISD argues that Villarreal's conduct violated the policy at JFK Elementary, which prohibited corporal punishment and allowed only progressive discipline. The Commissioner argues in response that § 22.0512 of the education code and § 9.62 of the penal code override a local principal's corporal punishment policy. *See id.*; TEX. PENAL CODE ANN. § 9.62. The Commissioner further argues that ECISD did not raise this argument before the Commissioner and thereby waived it.[7] By its second issue, ECISD argues that even if Villarreal's conduct did not violate JFK's corporal punishment policy, it was objectively unreasonable.

A. Standard of Review of the Commissioner's Decision

On appeal, the focus of this Court's review, as in the district court, is on the decision of the Commissioner. *See Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 562 (Tex. 2000); *Goodie v. Hous. Indep. Sch. Dist*., 57 S.W.3d 646, 650 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). "A Commissioner's decision may only be reversed on appeal if the decision is not supported by substantial evidence or the [C]ommissioner's conclusions of law are erroneous." *Wittman v. Nelson*, 100 S.W.3d 356, 359 (Tex. App.—San Antonio 2002, pet. denied); *see also* TEX. EDUC. CODE ANN. § 21.307(f). In this

[7] *See* 19 TEX. ADMIN CODE §157.1051(b) (stating that the Commissioner "will not consider any issue not raised in the petition for review.").

context, substantial evidence means more than a scintilla. *Mireles v. Tex. Dep't of Pub. Safety*, 9 S.W.3d 128, 131 (Tex. 1999) (per curiam). Under this standard, the evidence may preponderate against the decision, yet still amount to substantial evidence. *Id.* We will "uphold the Commissioner's decision on any legal basis shown in the record." *Goodie*, 57 S.W.3d at 650. Additionally, we "may not substitute [our] judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion." *Jenkins v. Crosby Indep. Sch. Dist*., 537 S.W.3d 142, 149–50 (Tex. App.—Austin 2017, no pet.).

"An agency's decision is arbitrary or results from an abuse of discretion if the agency: (1) failed to consider a factor the legislature directs it to consider; (2) considers an irrelevant factor; or (3) weighs only relevant factors that the legislature directs it to consider but still reaches a completely unreasonable result." *City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 184 (Tex. 1994) (citing *Gerst v. Nixon*, 411 S.W.2d 350, 360 n.8 (Tex. 1966)). An agency decision is also arbitrary and capricious if it fails to "manifest a rational connection to the facts." *See Oncor Elec. Delivery Co. v. Pub. Util. Comm'n of Tex*., 406 S.W.3d 253, 265 (Tex. App.—Austin 2013, no pet.).

Here, because IHE's fact-findings were adopted by the Commissioner and are not challenged on appeal, those findings are binding on this Court. *See* TEX. EDUC. CODE ANN. § 21.303; *Lone Star Greyhound Park, Inc. v. Tex. Racing Comm'n*, 863 S.W.2d 742, 752 (Tex. App.—Austin 1993, writ denied); *see also Lewis v. Austin Indep. Sch. Dist*., No. 03-02-00325-CV, 2003 WL 124250, at *4 (Tex. App.—Austin Jan. 16, 2003, no pet.) (mem. op.).

B. Teacher Immunity

Villarreal argued and the Commissioner held that teacher immunity pursuant to § 22.0512 protected Villarreal from discipline. *See* TEX. EDUC. CODE ANN. § 22.0512. Section 22.0512 provides that a public school teacher is immune from discipline for his or her use of physical force against a student to the extent justified under § 9.62 of the penal code. *See id.* § 22.0512(a).

Section 9.62 of the Texas Penal Code provides that 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 ANN. § 9.62. Reasonable belief involves an objective—not subjective—standard defined as "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." *Id.* § 1.07(42). The factors to be used in evaluating the reasonableness of a belief that use of force is necessary are:

> (1) the age, sex, and condition of the child; (2) the nature of his offense or conduct and his motives; (3) the influence of the student's example upon other students; (4) whether the force was reasonably necessary to compel obedience to a proper command; and (5) whether the force was disproportionate to the offense, is unnecessarily degrading, or is likely to cause serious injury.

Hogenson, 542 S.W.2d at 459 (quoting the factors used to determine reasonableness of the belief that use of force is necessary from the RESTATEMENT (SECOND) OF TORTS §§ 147, 150, 151, 155); *see also Spacek v. Charles*, 928 S.W.2d 88, 95–96 (Tex. App.—

Houston [14th Dist.] 1996, writ dism'd w.o.j.) (considering teacher immunity for use of force in 42 U.S.C. § 1983 case).

Under § 22.0512, the district has the burden to prove that an educator did not have an objectively reasonable belief that force was necessary to maintain control of a group or to compel obedience to a proper command. TEX. EDUC. CODE ANN. § 22.0512.; TEX. PENAL CODE ANN. §§ 9.61, 9.62; *see also Earthly v. Fort Bend Indep. Sch. Dist.*, No. 040-R2-0209, 2009 WL 10681191, at *6 (Tex. Educ. Agency 2009); *Lee v. Dall. Indep. Sch. Dist.*, Docket No. 012-R12-12-2015 (Tex. Educ. Agency 2012) (concluding that teacher immunity is not an affirmative defense). During the hearing before the Board of Trustees, both Villarreal's counsel and ECISD's counsel agreed with this statement of the respective burdens. The Commissioner included it in his conclusions of law. ECISD contests the placement of the burden for the first time on appeal, contending that it is Villarreal's burden to prove that his use of force was reasonable and he is entitled to immunity.

The Commissioner concluded that when a professional educator uses reasonable force as contemplated by § 22.0512, a school district may not discipline the educator for violating its policy. *See* TEX. EDUC. CODE ANN. § 22.0512; *see also Earthly,* 2009 WL 10681191, at *6. The Commissioner reasoned in *Earthly* that § 22.0512 is a remedial statute which must be construed broadly, relying on *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex. 1994). 2009 WL 10681191, at *6. When a statute is curative or remedial in nature, it is "given the most comprehensive and liberal construction possible." *Burch v. City of San Antonio*, 518 S.W.2d 540, 544 (Tex. 1975). "An agency's interpretation of a statute it

enforces 'is entitled to "serious consideration," so long as the construction is reasonable and does not conflict with the statute's language.'" *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017) (quoting *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011)); *Stanford v. Butler,* 181 S.W.2d 269, 273 (Tex. 1944); *see Dodd*, 870 S.W.2d at 7 (reviewing Commissioner of Education's interpretation of education code).

During the hearing before the Board, both parties accepted that ECISD had the burden of proof. Thus, we accept the Commissioner's placement of the burden, which we conclude is a reasonable construction of the statute. *See Dodd*, 870 S.W.2d at 7.

C. Discussion

1. Corporal Punishment Policy

By its first issue, ECISD argues that Villarreal's contract could be terminated because he violated the ECISD's corporal punishment policy. Because we sustain ECISD's second issue, we need not decide its first issue. *See* Tex. R. App. P. 47.1.

2. Did Villarreal Reasonably Believe the Use of Force Was Necessary?

By its second issue, ECISD challenges the Commissioner's decision that Villarreal's belief that the use of physical force was necessary against multiple students on multiple occasions was objectively reasonable. Focusing on the same unchallenged findings of fact, ECISD argues that even if Villarreal's conduct did not violate ECISD's and the JFK campus's corporal punishment policies, his continued use of force on campus to inflict pain on the students was unreasonable and unnecessary in light of the other methods of discipline that other teachers used, particularly in light of his earlier

reprimand in 2012. ECISD relies on the IHE's Finding of Fact 30.

However, the Commissioner concluded that Finding of Fact 30 was based on an erroneous legal standard and was arbitrary and capricious. The Commissioner then concluded that under the proper legal standard, Villarreal's use of force was objectively reasonable and that, therefore, Villarreal was entitled to immunity pursuant to § 22.0512. *See* TEX. EDUC. CODE ANN. § 22.0512. The Commissioner concluded that the real issue was application of the correct legal standard, not the facts. Because we reject the Commissioner's disregard of Finding of Fact 30 on different grounds, we do not address his conclusion that the finding is a mixed question of fact and law.

The Commissioner adopted all of the IHE's Findings, including Finding of Fact number 29(l), which recited that Villarreal failed to meet standards of professional conduct and identified three code of ethics violations which were violations of ECISD Board Policy. Nevertheless, the Commissioner did not address these policy violations in his opinion.

Finding of Fact 30 considered the record as a whole including Villarreal's prior reprimand. In 2012, Bernal found that Villarreal violated the Educator's Code of Ethics, just as the IHE found this time. The code of ethics requires in part that an educator shall not engage in physical mistreatment or abuse of students. *See* 19 TEX. ADMIN. CODE § 247.2(3)(E). The Commissioner conceded here that the *Hogenson* standards are "good and useful standards" but are not the exclusive standards that can be applied. ECISD argues that the Commissioner did not consider that the IHE applied the Educator's Code of Ethics which is part of the statutory scheme governing conduct of all teachers and has been adopted as part of ECISD's School Board Policy. *See* TEX. EDUC. CODE ANN.

§ 21.041. These standards apply during actions involving teacher licensing proceedings *and* during teacher disciplinary proceedings at the school district level. *See id.*; *see also Madden v. State Bd. for Educator Certification*, No. 03-11-00584-CV, 2014 WL 2191927, at *8 (Tex. App.—Austin May 22, 2014, pet. denied) (mem. op.) (noting that "[t]he Legislature has given the [State Board for Educator Certification] authority under section 21.041 of the Education Code to enforce the Educators' Code of Ethics and establish proceedings for educator discipline. *See* TEX. EDUC. CODE ANN. § 21.041(b)(7), (8).").[8]

Section 9.62(2) requires that the actor's reasonable belief be tempered by "*when and to the degree* the actor reasonably believes the force is necessary." *See* TEX. PEN. CODE ANN. § 9.62 (emphasis added). The phrase "when and to the degree the actor reasonably believes" encompasses the totality of the circumstances, including the actor's training, the school's policies, as well as the specific circumstances confronting him. The Educator's Code of Ethics, which was incorporated into ECISD Board policy and which prohibited an educator from intentionally, knowingly or recklessly engaging "in physical mistreatment, neglect, or abuse of a student or minor" were part of those circumstances and formed part of Villarreal's 2012 reprimand. *See* TEX. ADMIN. CODE ANN. § 247.2(3)(5). By failing to consider the code of ethics as part of the totality of the circumstances that the IHE considered as a basis for her decision that Villarreal did not have an objectively reasonable belief that the use of physical force was necessary, the Commissioner's

[8] In defending his decision, the Commissioner argues that ECISD waived any argument that the Educator's Code of Ethics applies, citing to ECISD's brief to the Commissioner. ECISD's brief argued that Villarreal's termination was justified under the totality of the circumstances and that the Commissioner could not disregard Finding of Fact 30. When the Commissioner did so, ECISD filed a motion for rehearing arguing that the code of ethics cited by the IHE formed a proper basis for the IHE's decision. We do not find waiver.

labeling of Finding of Fact 30 as arbitrary and capricious was an abuse of discretion. *See City of El Paso*, 883 S.W.2d 184 (Tex. 1994) ("An agency's decision is arbitrary or results from an abuse of discretion if the agency: (1) failed to consider a factor the legislature directs it to consider; (2) considers an irrelevant factor; or (3) weighs only relevant factors that the legislature directs it to consider but still reaches a completely unreasonable result."). As a result, the Commissioner's failure to accept Finding of Fact 30 in its entirety was arbitrary and an abuse of discretion.

Consequently, the Commissioner could not disregard Finding of Fact 30 which stated that Villarreal did not have an objectively reasonable belief that physical force was necessary. Accordingly, the Commissioner's Conclusions of Law 9, 11, and 12, which were all based on the erroneous rejection of Finding of Fact 30, are not supported by substantial evidence.

We sustain ECISD's second issue.

IV. CONCLUSION

We reverse the judgment of the trial court and render judgment in favor of ECISD.

GINA M. BENAVIDES,
Justice

Delivered and filed the
9th day of April, 2020.