

Furlough for Declining Enrollment Upheld by Arbitrator

In a case just decided, and handled by Andrews and Beard, an arbitrator upheld a furlough for declining enrollment in the case of *Bedford Area School District*. In June of 2010, the Board of School Directors voted to furlough one full-time administrative position as the result of a substantial decrease in pupil enrollment under Pennsylvania School Code 1124.1. The furloughed administrator was notified of the Board action and was advised of his rights under 1125.1 of the School Code, which would allow him to realign into a position which he previously held or had the necessary skill, certification, and ability to perform.

The furloughed administrator elected to exercise his realignment rights under 1125.1 into the Business Education Department, which resulted in the furlough of the least senior member of that department. Two days after the least senior department member was bumped, the Association filed a grievance on her behalf claiming that there was no legal reason for her furlough and it was done without just cause.

At the outset, the arbitrator noted that there was no guidance in the School Code defining a “substantial decrease in pupil enrollment;” although, the Pennsylvania Appellate Courts have made it clear that without such a definition, Board action will not be disturbed absent a showing of abuse of discretion.

In his decision, the arbitrator noted that Appellate Courts have considered pupil decreases of 15.6 percent over 10 years, 11.7 percent over five years, and 3.5 percent over three years as substantial decreases. Further, arbitrators have considered pupil

decreases of seven percent over seven years, 11 percent over seven years, and 12.5 percent over six years as substantial. Considering these declines, the arbitrator found himself “hard-pressed to conclude that a decline in pupil enrollment of 4.56 percent over a five-year period would constitute an abuse of the discretion accorded the School District to justify the suspension of a professional employee.”

Although the arbitrator commented that the 4.56 percent decline was on the low end of declines found to justify a suspension, he could not find that the Board’s determination was “arbitrary, capricious, or unreasonable.” Thus, he found that the District had met its burden in proving a substantial decrease in enrollment pursuant to Section 1124.1 of the School Code.

The Association also claimed that even if the District was able to establish a substantial decrease in enrollment, it still failed to take the necessary Board action to suspend the Grievant; therefore, her suspension is null and void. The arbitrator found this argument to be completely devoid of merit because the Board had the discretion to decide in what programs it would be best to cut teaching positions once a substantial decline in enrollment had been demonstrated.

Once the Board had made the determination to eliminate the administrative position pursuant to Section 1124.1, the furloughed employee’s rights under Section 1125.1 of the School Code were automatically triggered. Under Section 1125.1, the District was obligated to realign its professional

Furlough

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staff so as to ensure that more senior employees are provided with the opportunity to fill positions for which they are certified but are currently filled by less senior employees. Once the furloughed administrator chose to exercise his rights under this portion of the School Code, the District was left with no choice but to furlough the Grievant.

Thus, when the furloughed administrator exercised his rights under Section 1125.1, the District found itself in a position where it had one excess teacher in its Business Education Department. As a result, the Grievant was informed that the realignment would result in her position being filled by a more senior employee and his or her own furlough. Since the District successfully demonstrated that the Grievant's furlough was based upon one of the causes permitted under Section 1124.1, which places no restriction on the District's discretion in determining who should be suspended once it has determined that it has experienced a substantial decline in pupil enrollment, the arbitrator denied the grievance and upheld the furlough.

Settlement in Facebook Firing Case

The *International Business Times* and the *National School Boards Association* have both reported that the National Labor Relations Board has settled a case against a Connecticut ambulance company that fired an employee for publishing negative remarks about her boss on her Facebook page. The NLRB claimed that the employee's speech was protected under federal labor laws and she was therefore terminated illegally.

The NLRB claimed that the company's blogging and Internet policy was enforced in an overly broad manner that restricted the ability of employees to discuss their wages, hours, and working conditions with co-workers and others while not at work. The company agreed to a settlement for an unreported financial amount, but did publicly report that it will change its policy to no longer restrict an employee's right to discuss their wages, hours, and working conditions outside of work.

School Districts should have policies in effect that address employee blogging and social networking. However, these policies should be carefully crafted to protect the District's public image but not restrict the employee's rights under federal law. Take the
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OSHA Review Commission Rules on Crowd

An Occupational Safety and Health Review Commission upheld the citation and penalty issued to Wal-Mart in response to a trampling death of a worker at one of the company's retail stores.

Under federal law, employers are still legally responsible for providing a place of employment free from recognized hazards that are likely to cause serious injury or death. If these risks are not properly managed, large crowds may pose risks to employees and guests alike. The Review Commission determined that crowd management practices and training should have been provided to Wal-Mart's employees to provide them with the skills and ability to control a large crowd of shoppers.

Although OSHA does not apply to Pennsylvania School Districts, there is an important lesson to be gleaned from this incident and the ruling. School Districts often deal with large crowds at sporting events, graduations, and even Board meetings. As such, those employees who work at these events should receive some training in crowd control and the District should consistently evaluate its crowd and traffic control practices and procedures.

New Legislation May Have Dramatic Impact on Schools

Several new bills are making their way through the Pennsylvania Legislature that will make important changes to the School Code. According to the Pennsylvania School Boards Association, these bills are picking up traction and may soon become law.

First, Senate Bill 612 could make dramatic changes to the portions of the School Code addressing teacher furloughs. This Bill provides a new justification for teacher furloughs beyond the current four causes currently allowed under the School Code.

It is proposed by this Bill that School Districts be allowed to furlough teachers based upon economic reasons. Districts shall be able to furlough a professional employee if they furlough an equal percentage of administrative staff. Thus, in order to furlough five percent of the current teachers in a District, the Board would have to also furlough five percent of the administrative staff. The Board could request a waiver of this provision from the Department of Education if compliance with this provision would be likely to cause significant harm to the operations of the school.

The House has also proposed a Bill that will expand a District's ability to furlough professional staff. House Bill 855 provides a very different mechanism to furlough teachers for economic reasons from the one proposed by Senate Bill 612.

The procedure proposed by House Bill 855 begins with the passage of a resolution by the School Board that calls for suspension of professional employees for economic reasons after a public meeting is held on the issue. The public meeting must be held with at least ten days' minimum notice. Further, the public must be given the opportunity to comment regarding the planned suspension of professional employees at this meeting.

The School Board must also provide documentation that demonstrates the economic reasons for the suspension, which may include the preliminary budget, proposed final budget, annual financial report, or any other document that the District deems necessary. These documents must be

available for public inspection for at least ten days prior to the meeting held to vote on the resolution approving the furlough of professional employees.

Under House Bill 855, a District shall have "economic reasons" supporting a furlough of professional employees where after assessing its entire budget for possible reductions, it would still need to exceed the Act 1 index in order to meet its budgetary requirements. This new right to furlough for economic reasons would not be without restrictions; as all savings realized from the furlough for economic reasons must be used to offset any increase in costs or decrease in State and local revenue.

House Bill 855 also defines, and thereby restricts, the District's evaluation of employees to be furloughed. Furloughs must be based upon the employee's certification; the employee's performance (including PVAAS and local performance criteria); employee qualifications; and other specific qualifications established by the school entity.

The Bill specifically restricts its application to current collective bargaining agreements; hence, future collective bargaining agreements may be negotiated to mitigate or further refine the provisions of this Bill. For instance, future CBAs may redefine the criteria for selecting employees for furlough, e.g. substituting seniority for the factors provided for in this Bill. Districts should remain abreast of the progress of these Bills, as they could have a dramatic impact on the ability of School Districts to respond to the Budget Crisis.

CBA Language Restricts Employee's Right to Appeal Arbitration Award

In *Ray v. Brookville Area School District*, an elementary school teacher, employed during the 2008-09 school year, was investigated for the misuse of District technology and equipment when she used unprofessional language in District emails, pursued an unprofessional relationship with the Director of Technology on District property, and engaged in non-work related activities during her work day. She was given a Loudermill hearing and was then suspended without pay.

A Loudermill hearing is a pre-termination hearing to provide a public employee with his or her due process rights as required by the United States Supreme Court in *Cleveland Board of Education v. Loudermill*. The Association grieved her suspension without pay, claiming that she was suspended without just cause. After a three-day arbitration hearing, at which the teacher was represented by Association counsel, the arbitrator ultimately ruled in favor of the District.

The teacher then chose to appeal the arbitration award; however, the Association did not participate in her appeal. In response to her independent appeal, the District filed a motion to quash the appeal on the ground that she lacked standing under the Collective Bargaining Agreement to appeal the arbitration award. The District argued that only the Association was vested with the authority to appeal an arbitration decision under the CBA. Ultimately, the trial court agreed and dismissed the appeal.

The teacher argued on appeal to the Commonwealth Court that the trial court erred in its construction of the CBA, which gave her the explicit right to represent herself "at all stages of the grievance proceeding." She argued that this language gives her the right to appeal an arbitration award with or without the approval of the Association. The District disagreed and the Association joined in the appeal, both arguing that the exclusive right to file an appeal to an arbitration award lies with the Association and the District, not the individual employee.

In response to the teacher's claim that her right to have her own representation at all stages of the grievance procedure gives her the right to choose to appeal the arbitration decision independently, the District and the Association argued that because the Association has the exclusive right to request arbitration, the Association also has the exclusive right to choose whether or not to file an appeal to the arbitration award.

The Commonwealth Court determined that the Association had the exclusive right to appeal under the terms of the CBA. If the Association did not have an exclusive right to appeal under the language of the CBA, which provided the Association with the exclusive right to request arbitration, then the District would not receive the benefit of its bargain as it would face "the constant threat of attempted individual enforcement through litigation" and the Association's responsibility would also be diminished.

School Districts should review their grievance language in their CBAs and verify whether the Association, the employee, or both parties have the right to request arbitration. If the employee retains the right to request arbitration, then the employee will retain the right to file an appeal of an arbitration award if they so choose. If Districts are experiencing a heavy volume of arbitrations and they do not have language providing the exclusive right to request arbitration to the Association, the District should consider addressing this issue in future negotiations.

Facebook

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opportunity to review your blogging and social networking policy with your solicitor to ensure that the District's reputation is protected without illegally limiting an employee's rights under federal and state law.

Documents Stored on Personal Computer Not Necessarily Public Records

In *re Silberstein*, an attorney requested certain records from a York Township Commissioner's personal computer regarding communications between the Commissioner and citizens of the Township regarding a Traditional Neighborhood Development application. The request also included correspondence from another Commissioner regarding the same matter and all correspondence from a home builder to the Township since January 1, 2009.

The Township produced the requested documents that were under its possession and control; however, it did not produce any documents that were on computers maintained by the Commissioners. The Township did not consider electronic communications between one individual Commissioner and a citizen or citizens as public records as defined under the Right-to-Know Law (RTKL).

The Office of Open Records (OOR) determined that the records contained on the Commissioners personal computers to private citizens were public records in the possession of the Township and that the Township should obtain the records from the Commissioners and redact any non-public or privileged information. The OOR also placed the burden of demonstrating that the requested records were exempt from disclosure on the Township, rather than on the requestor.

On appeal, the trial court determined that the requestor had the burden of proving that the requested records were "public records." According to the trial court, simply because the records were maintained on a public official's computer does not mean that the records are public records. The Commissioner himself is not a governmental entity and is unable to act alone on behalf of the Township. Further, the Commissioner does not have an obligation to disclose every conversation, note, email, or telephone call in which he discusses Township matters.

The attorney appealed the trial court's ruling overturning the OOR decision to the Commonwealth Court. This case presented an issue of first impression

under the new RTKL as to whether requested records contained on a township commissioner's personal computer are public records in the possession or control of the township.

After examining the definition of a record and a public record, the Commonwealth Court then considered whether or not the emails or documents of an individual public office holder are public records.

The Commonwealth Court was swayed by the fact that the Commissioner was not a governmental entity himself; rather, he was solely an individual public official with no authority to act alone on behalf of the Township. As a result, emails and documents found on his personal computer did not fall within the purview of the RTKL. Documents personally and individually created by the Commissioner are not documentation of an activity or transaction of the Township. Unless the documents were produced with the authority of the Township or were later ratified, adopted, or confirmed by the Township, these documents are not public records.

This determination does not allow public authorities to hide documents on personal computers in order to prevent their access through the RTKL. However, it does exclude communications from one member of the elected body to his or her constituents or others from public disclosure. The key factor here is that the elected member cannot act for the Township, thus, his or her communications are not official acts unless they have been ratified, adopted, confirmed, or previously authorized by the entire membership of the public body.

The RTKL is a constantly evolving body of case law. School Districts should consult their solicitor or special counsel prior to making a determination under the RTKL.

Plaintiff Delays Agreeing to Settlement with School District over Confidentiality

In a case against the Woodland Hills School District, a settlement was reached between the parties and it was agreed that contingent upon approval by the School Board, the dispute would be settled and dismissed. The School Board proceeded to vote in favor of the settlement—less than two weeks later at its October 12, 2010 meeting.

The settlement was reached in a mediation between the parties and was recorded on a hand written sheet of paper prepared at the mediation. However, the Plaintiff's counsel objected to finalizing and signing any written agreement without first receiving settlement proceeds and complete confidentiality.

First, the Court noted that the School Board is not required to transfer the settlement funds before a settlement agreement is executed. Further, the negotiated settlement funds were being held by the Registry of the Clerk. The Court found this objection to be without foundation.

Second, complete confidentiality is not possible when dealing with a public entity like a School District. As a public entity, the District is subject to certain laws that require public disclosure of documents and records of the entity. The District cannot legally agree by private agreement to violate these statutes, such as the RTKL.

As a result, the complete confidentiality language must be read to exclude any legally mandated disclosures. The Court commented that it was "implausible" for the Plaintiff's counsel to be unaware of the requirements of these laws or the status of the School District as a public entity.

The "complete confidentiality" language will be interpreted to require that the District will only disclose the terms of the settlement as required by law. Thus, the restriction would be read to provide that the District and its officials may not *voluntarily* disclose the terms of the Agreement.

Confidentiality language occurs in many Agreements and oftentimes it is contained in form agreements presented to School Districts. Although all agreements should be brought to the District solicitor or special counsel for review, this is an example of language that should be amended, clarified, or removed from agreements with School Districts. At a minimum, confidentiality language should be amended to clarify that the agreement may be released in accordance with any applicable law requiring disclosure, such as the RTKL.

Parents Challenge State Formula for Special Education Funding

Parents from the Lancaster and Reading school districts sued the Pennsylvania Department of Education claiming that the Pennsylvania statute that apportions special education funding violates the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, the Due Process Clause of the Fourteenth Amendment, the Equal Educational Opportunities Act of 1974, and Title II of the Americans with Disabilities Act.

The parents alleged that the funding formula violates federal law because it requires the Pennsylvania Department of Education to allocate special education funds to a school district based upon the average daily membership of special education students across the Commonwealth rather than on the actual number of special education students enrolled in the District. The current funding approach is known as a "census based" funding model.

The Pennsylvania funding formula consists of four parts: (1) the base amount and supplement; (2) inflation index supplement; (3) minimum percentage increase; and (4) the special education contingency fund. The parents were mainly objecting to the first part of this formula, which accounts for the vast majority of the annual allocation of special education funding. The parents sought to receive *(continued next page)*

an injunction that would require the distribution of special education funds based upon the actual number of disabled students in each district and the actual cost of their special education needs.

The claims under the Rehabilitation Act and the Americans with Disabilities Act were dismissed because they were brought against Secretary Zahorchak and claims against individuals are not authorized by these Acts. The Section 1983 claim against the Department of Education for the violation of the Due Process Clause of the Fourteenth Amendment was dismissed because the Commonwealth's sovereign immunity had not been waived, thus the Department of Education cannot be sued under Section 1983.

Also, the Due Process claim against Secretary Zahorchak was also dismissed. Here the District Court held that because education is not a fundamental right, the funding scheme is only subject to rational basis review. Rational basis review is a very forgiving standard, as the court only considers whether or not

there is a rational basis for the funding scheme and does not consider the wisdom, equity, or effectiveness of the funding scheme. Since the Commonwealth put forth evidence demonstrating the reasoning behind its choice of funding scheme that demonstrated that it had a rational relationship to its stated purpose, the District Court was obligated to uphold the special education funding system.

However, the District Court did allow several of the parents' claims to survive. Summary judgment was denied for the IDEA, ADA, Rehabilitation Act, and EEOA claims against the Department of Education. Regarding all of these issues, questions of fact remained as to whether or not the special education funding scheme violated these federal laws. As a result, in the future the United States District Court for the Middle District of Pennsylvania will be making a decision that may have a serious impact on special education funding in Pennsylvania.

Patriotic Student Speech at Issue in a California Case

A California federal district court has ruled in favor of several students who were prohibited from wearing American flag T-shirts on Cinco de Mayo. In *Dariano v. Morgan Hill Unified School District*, the District Court permitted a suit against the District and two former high school administrators to proceed, denying the District's claim that the case was now moot because the Superintendent disavowed the principals' actions in limiting the speech of these students.

Three students were informed by a principal that they could not wear American flag T-shirts on Cinco de Mayo and were forced to take them off, turn them inside out, or be suspended. When the students objected to the principals' demands, they were told they could wear the shirts on any day except Cinco de Mayo. The principals claimed that the shirts could disrupt school activities.

Upon learning of the principals' actions, the Superintendent disavowed the ban on the American flag shirts on Cinco de Mayo with a public statement. This public statement and the fact that these two principals were no longer employed with the District

formed the factual substance of the District's claim that there was no longer a live controversy, making the case moot.

However, because the policy that imposed this discipline and authorized the principals' actions is still in place, the voluntary cessation of the challenged conduct alone will not suffice to moot the case, as the conduct could still be expected to recur. Since the policy at issue had not been amended or altered nor has a later policy been issued to prevent the recurrence of the challenged action, the case is not moot. Thus, this case will progress to trial.

News reports have added additional facts to this case that will likely come out at trial, if the parties do not settle prior to that point. On the day in question, other students on campus were wearing the colors of the Mexican flag but were not asked to remove their clothing and no other students were sent home or asked to turn their clothing inside out. The news article reported that the two principals were concerned about the potential for violence on campus.

Andrews and Beard Education Law Focus

As solicitors, labor counsel and special counsel, Andrews and Beard represents more than 100 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts. Andrews and Beard is also one of the first firms in the state to pioneer Timed Mediation to successfully negotiate teacher-union contracts in a 48-hour process. This process can result in the settlement of the contract six months before expiration, at a large financial savings to the School District.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carrier.

Our legal expertise includes: Negotiation of teacher and support staff contracts; Employment Discrimination; Special Education Litigation; Veterans' Preference Litigation; Teacher and Student Discipline Hearings; and Leaders in Timed Mediation Contract Negotiations.

About the Pennsylvania School Study Council

The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, www.ed.psu.edu/pssc/ or contact the Executive Director Dr. James P. Hartman at jph19@psu.edu.

Subsequent Issues

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